

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-168-2017
vs.	:
	:
	:
ASHLEY SCHAEFFER,	:
Defendant	: Omnibus Pretrial Motion

OPINION AND ORDER

Before the court is the defendant’s Omnibus Pretrial Motion. Several portions of the motion have previously been addressed. The defendant’s Motion in Limine to preclude any physical findings or observations unless said observations can be scientifically proven to be signs of impairment of Alprazolam (Xanax) and/or Buprenorphine (Suboxone) will be addressed after an argument which is scheduled for March 15, 2018.

This Opinion will address the defendant’s motion in limine to preclude admissibility of two compounds allegedly found in defendant’s blood. (Motion, paragraphs 21 through 24). Argument was held on the motion on February 27, 2018.

For the sole purpose of the motion, the facts are not contested. After being taken into custody, the defendant was transported to the Williamsport hospital for a blood draw. Once at the hospital and after being read the “O’Connell warnings,” the defendant agreed to submit to a blood draw. The blood test results were positive for, among other things, Buprenorphine and Norbuprenorphine. Buprenorphine is a Schedule III controlled substance. Norbuprenorphine is a metabolite of Buprenorphine. According to the blood test results, the amount of Buprenorphine found in defendant’s blood was 1.8 ng/ml. The amount of Norbuprenorphine found in defendant’s blood was 1.3 ng/ml.

The parties concede that the Pennsylvania Department of Health has not prescribed minimum levels of these substances which must be present in a person's blood in order for the test results to be admissible in a prosecution for a violation of 75 Pa. C.S.A. §3802(d)(2), driving under the influence of a controlled substance (impaired ability to safely drive).

Defendant argues that pursuant to 75 Pa. C.S.A. § 1547(c)(4) for the purposes of blood testing to determine the amount of a non-prescribed Schedule II or Schedule III control substance or metabolite of such a substance, the Department of Health shall prescribe minimum levels of these substances which must be present in a person's blood in order for the test results to be admissible in a prosecution for a violation of, among other sections, §3802(d)(2).

The Commonwealth argues that pursuant to 75 Pa. C.S. §1547(c)(4), the Department of Health published a notice of the minimum levels of, among other things, non-prescribed Schedule II and non-prescribed Schedule III controlled substances or their metabolites in 45 Pa. Bulletin 3638. This Pennsylvania Bulletin was published on Saturday, July 4, 2015. While it does not list a schedule or the minimum quantitation limits in terms of nanograms/millimeter of Buprenorphine or Norbuprenorphine, it does note the following language:

The Department recognizes that testing may be conducted for controlled substances and metabolites not listed in this notice. When testing is necessary, interested parties should contact the laboratory performing the test to inquire as to that laboratory's specific method of testing, the equipment used and any policies or procedures employed by that laboratory to ensure that the test results are valid. In subsequent notices, the Department will revise, as needed, the minimum levels of controlled substances or metabolites already included in this notice and

add new controlled substances or metabolites when warranted.

The resolution of this dispute requires the court to engage in statutory interpretation. “The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.” 1 Pa. C.S.A. § 1921(a). “When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” *Id.* § 1921(b).

As the Superior Court recently noted in *Commonwealth v. Lewis*:

In construing a statute to determine its meaning, courts must first determine whether the issue may be resolved by reference to the express language of the statute, which is to be read according to the plain meaning of the words. When analyzing particular words or phrases, we must construe them according to rules of grammar and according to their common and approved usage. Words of a statute are to be considered in their grammatical context. Furthermore, we may not add provisions that the general assembly has omitted unless the phrase is necessary to the construction of the statute. A presumption also exists that the legislature placed every word, sentence and provision in the statute for some purpose and therefore courts must give effect to every word.

2018 PA Super 46, 2018 Pa. Super. LEXIS 177, *3-*4 (March 2, 2018)(quoting *Commonwealth v. Morris*, 958 A.2d 569, 578-579 (Pa. Super. 2008)).

This court does not see any ambiguity in the statutory provision as enacted.

The defendant is charged with driving under the influence of controlled substances in violation of 75 Pa. C.S. §3802(d)(2). The Department is required to prescribe minimum levels of non-prescribed Schedule II and Schedule III controlled substances or metabolites of such substances which must be present in a person’s blood in order for the test results to be admissible in a prosecution for the offense to which defendant stands charged. The parties

agreed that Buprenorphine is a non-prescribed Schedule III controlled substance and Nubuprenorphine is a metabolite of Buprenorphine. The Department has not prescribed minimum levels for these controlled substances. Accordingly, the test results are not admissible pursuant to the clear and unambiguous language of 75 Pa. C.S. §1547(c)(4).

The Commonwealth's reliance on the Pennsylvania Bulletin is misplaced. The statute does not give the Department of Health the authority to not list controlled substances or metabolites and refer the "interested" party to the lab for further information. There is nothing in the statute that permits the Department of Health to delegate its statutory duties to the laboratory or facility conducting the testing.

The term "shall" is generally construed as creating a mandatory duty, and it has only been in rare cases involving matters of time or form that the word "shall" has been construed as creating only a discretionary or directory duty. *Commonwealth v. Ferguson*, 381 Pa. Super. 23, 552 A.2d 1075, 1080 (Pa. Super. 1988). Furthermore, the use of the word shall in other paragraphs and subparagraphs of section 1547 has been found to be mandatory, rather than directory. *See Commonwealth v. McGinnis*, 511 Pa 520, 515 A.2d 847, 850 (1986)(holding that test results obtained using modified equipment that was not approved by the Department were inadmissible); *Commonwealth v. Xander*, 14 A.3d 174, 178 (Pa. Super. 2011)(finding that section 1547(b) imposes upon the arresting officer the obligation to advise a defendant of the ramifications of his or her refusal to submit to chemical testing).

For the foregoing reasons, the court finds that the use of the word "shall" in section 1547(c)(4) creates an obligation upon the Department of Health to publish minimum levels of non-prescribed Schedule II and Schedule III controlled substances and metabolites

of such substances in order for the test results for those substances to be admissible in a prosecution for a violation of 75 Pa. C.S. §3802(d)(2).

ORDER

AND NOW, this ___ day of March 2018, following a hearing and argument, the court **GRANTS** the defendant's motion to preclude the Commonwealth from admitting in evidence the results of the defendant's blood test with respect to the alleged presence of Buprenorphine and Norbuprenorphine.

By The Court,

Marc F. Lovecchio, Judge

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Work File