

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :  
 :  
 vs. : No. CR-121-2020  
 :  
 JOSEPH L. PERSICO, :  
 Defendant :  
 :

Michael S. Greek, Esquire                      Counsel for Commonwealth  
Robert Buttner, Esquire                      Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - September 11, 2024

The Appellant, Joseph L. Persico (hereinafter "Persico") has filed an appeal<sup>1</sup> to Superior Court after his October 18, 2023 conviction, subsequent sentencing on February 27, 2024, and denial of his post sentencing motion filed on July 7, 2024 for the charge of Homicide by Motor Vehicle While Driving Under the Influence (75 Pa.C.S.A. §3735(A)) and related offenses. This Court did direct Persico to file a concise statement of errors complained of on appeal which he did on August 21, 2024. In that concise statement, Persico posits the following as errors of the Court:

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<sup>1</sup> Persico filed his original notice of appeal on July 29, 2024 from the denial of the post sentencing motion. Apparently realizing this was not proper, he filed an amended appeal on July 31, 2024 from the February 21, 2024 sentence and the subsequent denial of the post-sentencing motion. (See *Commonwealth v. Chamberlain*, 658 A.2d 395 (Pa. Super 1995) which stated that an order denying a post sentencing motion only acts to finalize a sentence for appeal purposes thus an appeal must be taken from the sentence, not the denial of the post sentencing motion).

Suppression of Evidence

- (1) Did the trial court err in failing to suppress the blood sample taken from the Defendant and all medical records and results of chemical blood testing of the blood sample, which constituted fruit of the poisonous tree, where the search and seizure of the Defendant's blood sample was performed without a search warrant, probable cause, reasonable suspicion, and consent of the Defendant in violation of the United States and Pennsylvania Constitutions?<sup>2</sup>

a. Did the trial court err in failing to suppress the blood sample taken from the Defendant and all results of chemical blood testing of the sample, which constituted fruit of the poisonous tree, where the search and seizure was achieved without certification of probable cause and not in compliance with 75 Pa.C.S.A § 3755?

- (2) Did the trial court err in failing to suppress the Defendant's medical records and all results of chemical blood testing of a blood sample of Defendant from the Lehigh Valley Hospital - Cedar Crest and Health Network Laboratory where the search warrants utilized to seize and/or search the aforesaid items were devoid of probable cause and, therefore, the seizure of medical records, blood sample, and all results of chemical blood testing of any blood sample were in violation of the United States and Pennsylvania Constitutions?<sup>3</sup>

a. Did the trial court err in failing to suppress the Defendant's medical records, the blood sample of the Defendant, and all results of chemical blood testing of the Defendant's blood sample where the search warrants and accompanying affidavits of probable cause were deficient because they lacked probable cause and were based upon illegal and incurable taint as a result of the illegal search and seizure of the Defendant's blood on November 7, 2020, constituted fruit of the poisonous tree, and were

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<sup>2</sup> U.S. Const., Amend IV & XIV; PA. Const., Article 1, § 9.

<sup>3</sup> U.S. Const., Amend IV & XIV; PA. Const., Article 1, § 9.

in violation of the United States and Pennsylvania Constitutions?<sup>4</sup>

- (3) Did the trial court err in failing to suppress the Defendant's medical records, blood sample, and all results from chemical blood testing, where the Commonwealth failed to sustain its burden of proof that the affidavits of probable cause for the search warrants contained sufficient indicia of probable cause and, instead, at the suppression hearing, subsequent to the issuance and execution of the warrants, presented greater detail of the Defendant's alleged travels, that a paramedic smelled alcohol, which facts were not contained in the search warrants in question to establish the existence of probable cause improperly?

- a. Did the trial court err in failing to suppress illegally obtained blood samples and chemical blood test results, whether in the Defendant's medical records or any report generated by Lehigh Valley Hospital - Cedar Crest or Health Network Laboratory, where the Commonwealth failed to sustain its burden of proof at the suppression hearing by failing to present the technician who drew the blood sample or the treating physician to establish that the blood draw was primarily for medical purposes or establish the basis for probable cause to draw blood from the Defendant?

Admission of Evidence

- (4) Did the trial court err in admitting the dash cam video purporting to show the subject crash where the Commonwealth was unable to lay a proper foundation and establish authenticity under Pa.R.E.901(a), which video was also used to prepare an accident reconstruction report, thereby depriving the Defendant of due process and a fair trial?
- (5) Did the trial court err in admitting the accident reconstruction report and testimony on accident reconstruction where the expert relied on inadmissible dash cam footage, depriving the Defendant of due process and a fair trial?
- (6) Did the trial court err in allowing former Trooper Blaski and former Trooper Grobinski to testify about what was

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<sup>4</sup> U.S. Const., Amend IV & XIV; PA. Const., Article 1, § 9.

portrayed in a dash cam video obtained from a motorist, where the foundation and authenticity under P.A.R.E. 901(a) was not established and this testimony deprived the Defendant of due process and a fair trial?

- (7) Did the trial court err in admitting and publishing Commonwealth Exhibit #10, where Trooper Hunter testified that he did not search the vehicle and the photograph was taken by the forensic scene unit thereby admitting and publishing the exhibit before a proper foundation and authentication were established under P.R.E. 901(a)?
- (8) Did the trial court err in allowing the introduction of blood analysis and results where there was no reliable testimony regarding the chain of custody of the blood sample from which the analysis and results were derived?

Instruction

- (9) Did the trial court err in failing to instruct the jury that homicide by vehicle while driving under the influence was not a strict liability crime and that the jury still must find a causal connection between the DUIs, the Defendant's alleged impaired state, and the accident.

Sufficiency of Evidence

- (10) Did the trial court err as a matter of law or abuse its discretion in failing to dismiss the offense of homicide by vehicle while driving under influence (75 Pa.C.S.A. §3735(a)) where the Commonwealth failed to establish, beyond a reasonable doubt, conduct that exceeded ordinary negligence and that the DUI under 75 Pa.C.S.A. §3802(c) or the Defendant's alleged impaired state under 75 Pa.C.S.A. §3802(a)(1) were the cause of the accident?
  - a. Did the trial court err in failing to dismiss the homicide by vehicle while driving under influence offense (75 Pa.C.S.A. §3735(a)) where the Commonwealth failed to establish, beyond a reasonable doubt, that there was a causal connection between the accident and driving under the influence under 75 Pa.C.S.A. §3802(c) or the Defendant's alleged impaired state under 75 Pa.C.S.A. §3802(a)(1)?
  - b. Did the Commonwealth fail to establish, beyond a reasonable doubt, that the Defendant was in an impaired state such that he was unable to safely operate a motor vehicle due to alcohol or a



controlled substance and guilty of DUI under 75 Pa.C.S.A. §3802(a)(1)?

- (11) Did the Commonwealth present sufficient evidence to establish, beyond a reasonable doubt, that the Defendant attempted to cause or intentionally, knowingly, or recklessly caused bodily injury to Pan Tso and establish that the Defendant committed the offense of simple assault under 18 Pa.C.S.A. §2701(a)(1)?
- (12) Did the Commonwealth prove, beyond a reasonable doubt, that the Defendant knowingly, or recklessly engaged in conduct that placed any member of the general public in danger of death or serious bodily injury to establish the offense of recklessly endangering another person under 18 Pa.C.S.A. §2705?
- (13) Did the Commonwealth prove, beyond a reasonable doubt, that the Defendant knowingly or recklessly engaged in conduct that placed Pan Tso in danger of death or serious bodily injury to establish the offense of recklessly endangering another person 18 Pa.C.S.A. §2705?
- (14) Did the Commonwealth prove, beyond a reasonable doubt, that the Defendant either recklessly or with gross negligence, caused the death of Paul Gerrity to establish the offense of homicide by vehicle 75 Pa.C.S.A. §3732(a)?
- (15) Did the Commonwealth establish, beyond a reasonable doubt, that the Defendant was guilty of Count 5, DUI: general impairment under 75 Pa.C.S.A. § 3802(a)(1) where the Commonwealth did not present testimony and evidence establishing that the Defendant's ability to operate a motor vehicle was impaired?
- (16) Did the Commonwealth establish, beyond a reasonable doubt, that the Defendant operated a vehicle with willful or wanton disregard for the safety of others and was guilty of reckless driving under 75 Pa.C.S.A. § 3736(a)?

Weight of Evidence

- (17) Was the verdict against the weight of the evidence where the Commonwealth failed to establish a causal connection between the DUIs and the accident and that the conduct of the Defendant exceeded ordinary negligence regarding the offense of homicide by vehicle while driving under influence under 75 Pa.C.S.A. §3735(a)?

In reviewing that concise statement and the claimed errors, this Court finds that many of these issues have been preserved either in a pre-trial motion or post-sentencing motion, and adequately addressed, decided and explained in the Order of Court dated June 29, 2021 dealing with the pre-trial motion and/or in the Memorandum Opinion dated July 2, 2024 addressing Persico's post-sentencing motion. Some of these however, were not preserved and are therefore considered waived<sup>5</sup> and will not otherwise be addressed here. One other, #7 was raised by objection at trial, and not in the post-sentence motion, however we do not believe it has been properly preserved for this appeal.<sup>6</sup> As to the other

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<sup>5</sup> Pa.R.A.P. 302 states that "[I]ssues not raised in the trial court are waived and cannot be raised for the first time on appeal." While prior defense counsel, in his post sentencing motion stated that "the verdict was against the sufficiency and weigh of the evidence", at oral argument, he only addressed the sufficiency of the evidence *vis-à-vis* the Homicide by Vehicle While DUI [(75 Pa.C.S.A. §3735(a)] offense and the causal connection issue but no other guilty verdicts rendered by the jury or the bench. Accordingly, not having preserved those specific issues in his post-sentence motion, argument or brief and not otherwise addressed by the Court in the attached Memorandum Opinion, they are waived for purposes of this appeal.

<sup>6</sup> Appellate counsel contends that the Court erred by admitting into evidence and publishing to the jury, Commonwealth Exhibit #10 which was a photograph of the interior of Persico's vehicle as testified to by the accident reconstruction expert, Corporal Matthew Hunter. In the concise statement, counsel states that it was error for the Court to admit this photo as there was no foundation laid nor authentication of it as required by P.R.E. 901(a). As we noted, the admission of Commonwealth Exhibit #10 was objected to by trial counsel, however, it was not on foundation or authentication grounds. In fact, at trial, counsel stated he was objecting to its admission based upon the discussion at sidebar which centered around Persico's objection to the Commonwealth's attempts to redirect Corporal Hunter on something beyond the scope of cross-examination, i.e. a search warrant. That objection was sustained in favor of Persico and no other objection was made as to Exhibit #10 at that time. Even if what counsel was attempting to argue as a basis for his objection *vis-à-vis* re-directing Corporal Hunter on the search warrant issue, the Commonwealth presented Trooper Scott Wysocky who participated in the execution of the search warrant and in the course of executing that warrant found the paper bag depicted in Commonwealth

alleged errors in the concise statement, rather than repeating ourselves, this Court has attached both the June 29, 2023 Order and July 2, 2024 Opinion to this Memorandum Opinion for the Appellate Court's perusal.

BY THE COURT:

  
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Joseph J. Matika, J.

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Exhibit #10. Further Trooper Wysocky testified that he was standing next to Corporal Hunter when Corporal Hunter took the photograph of a blue Pinnacle vodka bottle (Commonwealth Exhibit #13) which was found in the brown paper bag (Commonwealth Exhibit #10). Wysocky also testified that he was standing next to Corporal Hunter as Corporal Hunter photographed that same brown paper bag sitting on the passenger side floor of the Persico vehicle (Commonwealth Exhibit #15), that was depicted in the Commonwealth Exhibit #10.

Therefore, we first believe that this issue was not properly preserved on appeal via the manner in which it was objected to at trial nor for the reasons given by Appellate counsel in his concise statement. Even if it was implicitly preserved, there was no harm in admitting it.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. CR-121-2020
	:	
JOSEPH L. PERSICO,	:	
Defendant	:	

Michael S. Greek, Esq.	Counsel for Commonwealth District Attorney
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Paul J. Walker, Esq.	Counsel for Defendant
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ORDER OF COURT

AND NOW, this 29<sup>th</sup> day of June, 2021, upon consideration  
of

- The "Motion to Suppress Chemical Testing Results" ("Defendant's Suppression Motion") filed by Defendant Joseph L. Persico ("Defendant") on October 29, 2020;
- "Defendant Joseph Persico's Brief in Support of Motion to Suppress Evidence and Chemical Testing Results" ("Defendant's Brief in Support") filed by Defendant on April 19, 2021;
- The "Brief in Opposition to Motion to Defendant's Motion to Suppress Evidence and Chemical Testing Results" filed by the Commonwealth on May 25, 2021;
- "Defendant's Supplemental and Reply Brief to Commonwealth's Brief in Opposition to Defendant's Motion to Suppress Evidence and Chemical Testing Results" ("Defendant's Supplemental and Reply Brief in Support") filed by Defendant on June 3, 2021;

after the March 2, 2021 hearing thereon (the March 2, 2021 Hearing"), and upon a comprehensive review of this matter, it is hereby ORDERED and DECREED that Defendant's Suppression Motion is DENIED.

In furtherance of this Order, the Court makes the following:

I. Findings of Fact.

A. Pennsylvania State Trooper John P. Blaski.

1. On or about November and December, 2018, Trooper John P. Blaski ("Trooper Blaski") served as a Pennsylvania State Trooper stationed at Troop T - Pocono; Trooper Blaski held an assignment with the Patrol Unit, within which he stood in charge of handling vehicle crashes or monitoring traffic and administering citations as needed.

2. As of on or about November and December, 2018, Trooper Blaski had served as a Pennsylvania State Trooper for approximately twenty years and had investigated numerous vehicle crashes; On November 6 and November 7, 2018, Trooper Blaski served on assignment with the midnight patrol.

B. The Vehicle Collision and Collision Scene.

3. On November 6, 2018, at approximately 11:54 p.m., Trooper Blaski dispatched to investigate a three-vehicle crash on the Northeast Extension of the Pennsylvania Turnpike, Interstate 476 (the "Northeast Extension"), at approximately mile markers 74.4 and 74.5 northbound in Parryville Borough, Carbon County.

4. Upon arrival at the collision scene at 12:13 a.m. on November 7, 2018, Trooper Blaski observed a white Audi A4 (the "Audi A4") with Pennsylvania registration FTR9221 facing south against the Northeast Extension's concrete center diving barrier.

5. At the time of the subject vehicle collision, Defendant Joseph L. Persico ("Defendant" or "Mr. Persico") had been operating the Audi A4.

6. Trooper Blaski learned that the operator of the Audi A4 had been transported to Lehigh Valley Hospital - Cedar Crest prior to Trooper Blaski's arrival at the collision scene.

7. The three-vehicle collision occurred as the Audi A4 operated by Defendant traveled southbound in the northbound travel lanes of the Northeast Extension whereupon it collided head-on with a green Honda Civic traveling northbound in the left-hand lane and operated by Paul R. Gerrity ("Mr. Gerrity").

8. Upon impact with the Audi A4, the Honda Civic spun and struck a blue Toyota Corolla traveling northbound in the right-hand lane and operated by Pan Tso ("Mr. Tso").

9. Trooper Blaski remained at the collision scene from the time he arrived at 12:13 a.m. on November 7, 2018 until the end of his shift at 5:00 a.m. on November 7, 2018.

C. Activity of Medical Personnel at the Collision Scene.

1. Paramedic Jerad Yeastedt.

10. Jerad Yeastedt ("Mr. Yeastedt") served as the lead paramedic for Lehigh Ambulance at the collision scene.

11. At the collision scene, Mr. Yeastedt first checked Mr. Gerrity and found that he had no vital signs.



12. Upon checking Defendant, Mr. Yeastedt found him to be incoherent and "pretty much out of it" but did not smell alcohol on his breath.

2. Emergency Medical Technician / Driver Casey Rich.

13. Casey Rich ("Mr. Rich") served as an emergency medical technician and driver for Lehigh Ambulance at the collision scene.

14. At the collision scene, Mr. Rich interacted with defendant for about ten minutes; Mr. Rich believed that he smelled a faint odor of alcohol coming from Defendant.<sup>1</sup>

15. Mr. Rich reported that Defendant could not remember anything about the collision.

16. Trooper Blaski spoke with an ambulance attendant who did smell alcohol on Defendant's breath.

3. Paramedic Matthew Derkosh.

17. Matthew Derkosh ("Mr. Derkosh") served as a paramedic for Lehigh Ambulance at the collision scene.

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<sup>1</sup> The finding regarding Mr. Rich's belief that he smelled a faint odor of alcohol coming from Defendant derives from the Pennsylvania State Police Incident Report, Commonwealth's Exhibit 1, March 2, 2021 Hearing. Trooper Blaski did not include any reference to a faint odor of alcohol coming from Defendant in either the below-defined December 12, 2018 Health Network Laboratory Search Warrant or the December 12, 2018 Lehigh Valley Hospital Search Warrant, respectively Commonwealth's Exhibits 2 and 3, March 2, 2021 Hearing. Accordingly, the Court did not consider any existence of a faint odor of alcohol coming from Defendant in its probable cause analysis of said search warrants.

18. At the collision scene, Mr. Derkosh spoke with Defendant; Defendant related to Mr. Derkosh that he had a serious injury, could not remember anything about the crash, and could not remember anything about the night except for being placed onto a stretcher.

19. Mr. Derkosh did not smell any alcohol coming from Defendant.

4. Carbon County Deputy Coroner Robert W. Miller, Jr.

20. Carbon County Deputy Coroner Robert W. Miller, Jr. pronounced Mr. Gerrity dead at the collision scene at approximately 1:05 a.m. on November 7, 2018 from injuries sustained in the vehicle collision.

D. The Drawing of Defendant's Blood at Lehigh Valley Hospital - Cedar Crest.

21. Following the vehicle collision, Defendant arrived at the Emergency Department at Lehigh Valley Hospital - Cedar Crest at 12:32 a.m. on November 7, 2018.

22. At approximately 12:37 a.m., David J. Deisher, D.O. placed an order for, *inter alia*, an ethanol test.

23. At 1:01 a.m. on November 7, 2018, Raymond Garcia at the Lehigh Valley Hospital - Cedar Crest laboratory drew blood from Defendant.

24. Personnel at Lehigh Valley Hospital - Cedar Crest received Defendant's secured blood specimen in "Rapid Response" and locked said specimen at 1:28 a.m. on November 7, 2018.

25. Personnel at Lehigh Valley Hospital - Cedar Crest placed Defendant's secured blood specimen in "Secure Storage" at 4:10 a.m. on November 7, 2018.

26. Neither Trooper Blaski nor any other law enforcement officer requested a blood draw to be performed on Defendant for the purpose of chemical testing.

E. The Discovery of the Partially Full Vodka Bottle in Defendant's Audi A4.

27. While executing a search warrant on November 29, 2018, Pennsylvania State Police Corporal Matthew Hunter, stationed at Troop N - Hazleton, discovered a partially filled 375 milliliter bottle of Pinnacle brand vodka in a brown paper bag on the passenger side floorboard of Defendant's Audi A4 that had been involved in the subject vehicle collision and that had been securely stored since the subject vehicle collision.

F. The Commonwealth Seeks and Obtains Defendant's Blood Test Results.

28. On December 12, 2018, Trooper Blaski requested and received a search warrant with respect to "Health Network Laboratory" (sic) ("the December 12, 2018 Health Network Laboratory Search Warrant") for:

"[a] grey topped vial of blood that was taken from Joseph L. PERSICO (DOB 08/15/1950) on 11/07/18 at the Lehigh Valley Hospital - Cedar Crest. This vial was transported to the Health Network Laboratory, where it has been securely stored. I further request testing of this blood sample to determine the blood alcohol content and or presence [of] a controlled substance of Joseph L. PERSICO on 11/07/18."

29. On December 12, 2018, Trooper Blaski also requested and received a search warrant with respect to "Lehigh Valley Hospital - Cedar Crest" ("the December 12, 2018 Lehigh Valley Hospital Search Warrant") for Defendant's medical records pertaining to his treatment following the subject vehicle collision.

30. Trooper Blaski served the December 12, 2018 Health Network Laboratory Search Warrant upon Health Network Laboratory on December 12, 2018 at 794 Roble Road, Allentown, Pennsylvania.

31. Upon so doing, Health Network Laboratory personnel presented Trooper Blaski with a "Blood Alcohol and Toxicology Request / Chain-of-Custody" form; As instructed by such personnel, Trooper Blaski completed the "Police Officer's name and Signature" and "Police Officer Work Address" portions of this form on December 12, 2018.

32. On or about December 14, 2018, Health Network Laboratories performed an analysis of Defendant's blood that had been drawn at 1:01 a.m. on November 7, 2018 following the subject vehicle collision.

33. This analysis of Defendant's blood that had been drawn at 1:01 a.m. on November 7, 2018 following the subject vehicle collision revealed Defendant's blood alcohol content as of 1:01 a.m. on November 7, 2018 to be .22%.

## II. Conclusions of Law.

### A. Inapplicability of 75 Pa.C.S.A. §3755.

1. Section 3755 of Title Seventy-Five of the Pennsylvania Consolidated Statutes Annotated does not apply in this matter. matter.

### B. Probable Cause to Obtain the December 12, 2018 Health Network Laboratory Search Warrant.

2. Trooper Blaski possessed probable cause to secure the properly issued December 12, 2018 Health Network Laboratory Search Warrant and the properly issued December 12, 2018 Lehigh Valley Hospital Search Warrant.<sup>2</sup>

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<sup>2</sup> I. The United States Constitution and the Pennsylvania Constitution Provisions Against Unreasonable Searches and Seizures.

"Both the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution 'guarantee individuals freedom from unreasonable searches and seizures.'" See *Commonwealth v. Bostick*, 958 A.2d 543, 550 (Pa.Super. 2008) citing *Commonwealth v. El*, 933 A.2d 657, 660 (Pa.Super. 2007).

A search occurs when police - i.e., the government as opposed to a private individual or entity - "...intrude[s] upon a constitutionally protected area without the individual's explicit or implicit permission." See *Commonwealth v. Fulton*, 179 A.3d 475, 487-488 (Pa. 2018).

A. The Fourth Amendment to the United States Constitution.

The Fourth Amendment to the United States Constitution states "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See U.S. Const., Amend. IV.

B. Article I, Section 8 of the Pennsylvania Constitution.

Article I, Section 8 of the Pennsylvania Constitution provides that "[t]he people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." See Pennsylvania Const., Art. I, §8.

In the absence of an applicable exception, a search and seizure shall be deemed unreasonable unless the Commonwealth obtains a search warrant from an independent judicial officer based on a sufficient showing of probable cause. See *Commonwealth v. Gary*, 91 A.3d 102, 107 (Pa. 2014). See also *Commonwealth v. Evans*, A.3d 323, 327 (Pa.Super. 2016).

C. Federal and Pennsylvania Constitutional Protections Afforded in this Case.

As is the practice of the Pennsylvania Supreme Court, this Court shall assume for purposes of analysis that, in the absence of any contention to the contrary in this matter, the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution offer the same protection under the circumstances presented. See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 7, nn. 9, 10 (Pa. June 18, 2019).

II. Constitutional Analysis in this Matter.

A. The Commonwealth's Suppression Motion Burden.

In a motion to suppress evidence, the Commonwealth bears the burden to establish that it did not obtain the evidence in question in violation of the defendant's rights. See *Commonwealth v. Ryan*, 407 A.2d 1345, 1348 (Pa.Super. 1979).

B. Blood Draw; Inapplicability of Fourth Amendment; Inapplicability of Article I, Section 8; Inapplicability of 75 Pa.C.S.A. §3755 .

When conducted by the government, a blood draw constitutes a search pursuant to both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. See *Birchfield v.*



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*North Dakota*, 136 S.Ct. 2160, 2173 (2016). See also *Commonwealth v. Smith*, 77 A.3d 562, 566 (Pa. 2013).

In the instant matter, the subject blood draw occurred without any contact between law enforcement and Lehigh Valley Hospital - Cedar Crest medical personnel. Neither Trooper Blaski nor any other law enforcement officer requested a blood draw to be performed on Defendant for the purpose of chemical testing.

Accordingly, in the absence of government involvement in the subject blood draw, the blood draw cannot said to be a search implicated by either the Fourth Amendment to the United States Constitution or Article 1, Section 8 of the Pennsylvania Constitution. See *Commonwealth v. Seibert*, 799 A.2d 54 (Pa.Super. 2002).

Further, Section 3755 of Title Seventy-Five of the Pennsylvania Consolidated Statutes Annotated does not apply in this matter. See 75 Pa.C.S.A. §3755(a) (emphasis added) ("(a) General rule. - If, as a result of a motor vehicle accident, the person who drove, operated or was in actual physical control of the movement of any involved motor vehicle requires medical treatment in an emergency room of a hospital and if probable cause exists to believe that a violation of section 3802 (relating to driving under of alcohol or controlled substance) was involved, the emergency room physician or his designee shall promptly take blood samples from those persons and transmit them within 24 hours for testing t the Department of Health or a clinical laboratory licensed and approved by the Department of Health and specifically designated for this purpose.").

Where, as in this case, there exists "no evidence to suggest [the] blood draw had been taken for any reason other than independent medical purposes... the Commonwealth [has] no obligation to prove the sample was taken for independent medical purposes." See *Commonwealth v. Miller*, 996 A.2d 508, 515 (Pa.Super. 2010). Additionally, in the absence of contact between relevant law enforcement personnel and relevant medical personnel prior to the conduct of a subject blood draw, a court may conclude that said blood draw occurred for independent medical purposes rather than any law enforcement probable cause determination. See *Id.* at 514.

C. Probable Cause to Secure the December 12, 2018 Health Laboratory Search Warrant and the December 12, 2018 Lehigh Valley Hospital Search Warrant.

Trooper Blaski possessed probable cause to secure the both the December 12, 2018 Health Network Laboratory Search Warrant and the December 12, 2018 Lehigh Valley Hospital Search Warrant.

A court must employ a totality of circumstances analysis when determining whether an affidavit of probable cause contained sufficient facts to establish probable cause that a crime occurred. See *Commonwealth v. Murphy*, 795 A.2d 997 (Pa.Super. 2002). In order to establish probable cause, the affiant must relay facts and circumstances within his or her knowledge sufficient to warrant a person or reasonable caution to believe that a crime has been or is being committed. See also *Commonwealth v. Ruey*, 892 A.2d 802, 810 (Pa. 2006) citing *Commonwealth v. Watson*, 724 A.2d 289,

III. Conclusion.

1. Having found no violation of Defendant's rights, Defendant's Suppression Motion is hereby DENIED.

BY THE COURT:

  
Joseph J. Matika, J.

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292 (Pa. 1998) (Article I, section 8 of the Pennsylvania Constitution requires a warrant to describe with specificity the place to be searched and the items to be seized along with probable cause that items sought will provide evidence of a crime).

In the instant matter the Court finds that the subject affidavits of probable cause - delineating allegations of Defendant's solo wrong-way travel on the Northeast Extension, the resultant fatal vehicle collision, and the discovery of a partially filled 375 milliliter bottle of Pinnacle brand vodka in a brown paper bag on the passenger side floorboard of Defendant's secured Audi A4 - contain, under a totality of circumstances standard, sufficient facts to establish probable cause to support the December 12, 2018 Health Network Laboratory Search Warrant and the December 12, 2018 Lehigh Valley Hospital Search Warrant.

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CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

vs. :

No. CR-121-2020

JOSEPH L. PERSICO,  
Defendant :

Kara Beck, Esquire

Counsel for Plaintiff

Paul Walker, Esquire

Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - July 2, 2024

The Defendant, Joseph L. Persico (hereinafter "Persico" or "Defendant") had filed a Post Sentence Motion after having been convicted at a jury trial<sup>1</sup> of a number of violations of both the Vehicle Code and Crimes Codes and subsequently sentenced to an aggregate three (3) to six (6) year period of incarceration in a state correctional institution. After a hearing and argument and a review of the post argument legal briefs, Persico's Post Sentence Motion is **DENIED** *in toto*.

FILED IN OFFICE  
JUL 13 2024

<sup>1</sup> The Defendant was charged with the following offenses for which the Jury found him guilty: Count #1: Homicide by Vehicle While Driving Under the Influence (75 Pa.C.S.A. §3735(A)); Count #2 Homicide By Vehicle (75 Pa.C.S.A. §3732(A)); Count #3 Involuntary Manslaughter (18 Pa.C.S.A. §2504(A)); Count #4 Simple Assault (18 Pa.C.S.A. §2701(A)(1)); Count #5 Recklessly Endangering Another Person (Public) (18 Pa.C.S.A. §2705); and Count #6 Reckless Endangering Another Person (Pan Tso)(18 Pa.C.S.A. §2705). Other charges, namely, Driving Under the Influence (75 Pa.C.S.A. §3802(a)(1) and (c)) and various other summary vehicle code violations were tried by the undersigned resulting in guilty verdicts (with the exception of the careless driving offense, 75 Pa.C.S.A. §3714(b)).

### FACTUAL AND PROCEDURAL BACKGROUND

On November 6, 2018, a horrific three vehicle accident occurred in the northbound lanes of the Pennsylvania Turnpike (I476) in Parryville, Carbon County, that claimed the life of Paul Gerrity (hereinafter "Gerrity") and injured one Pan Tso (hereinafter "Tso"). That tragedy, as alleged by the Pennsylvania State Police, Trooper John D. Blaski (hereinafter "Blaski") occurred when Persico was operating his white Audi southbound in the northbound lanes of the turnpike striking Gerrity's vehicle head-on and causing it to then collide with Tso's vehicle, all occurring while Persico had a B.A.C. of .22. On October 18, 2023, Persico was convicted of all charges except that summary offense of careless driving. Thereafter, on February 27, 2024 Persico was sentenced to an aggregate three (3) to six (6) year state sentence referenced above. On March 6, 2024, the Defendant timely filed the subject post sentence motion. In that motion, Persico claims that the Court committed four (4) errors prior to or during the trial and closing instructions as follows: 1) by permitting the introduction of a video tape depicting the accident recorded on Tso's dash cam without proper authentication or evidence of the necessary chain of custody; 2) by denying a defense request for a mistrial after the Assistant District Attorney expressed her personal beliefs as to the guilt of the Defendant and her ability

to prove it; 3) by permitting the introduction of the analysis of the blood of the Defendant for purposes of establishing Defendant's B.A.C. without reliable testimony as to the chain of custody of that blood from draw to analysis; and 4) by refusing to instruct the jury that homicide by vehicle while driving under the influence was not a strict liability crime which would have required the Court to further advise the jury of that so as to find a causal connection between the death of Gerrity and Persico's intoxication. Persico also claimed in this post sentencing motion that the Commonwealth failed to prove the casual connection between Defendant's B.A.C. and the impact that would have on his ability to drive leading to Gerrity's death. Persico claimed that the verdict of guilty on the charge of Homicide By Vehicle While Driving Under The Influence Of Alcohol was against both the weight and sufficiency of the evidence because of this failure.

This Court will now address each of these claims seriatim.

#### LEGAL DISCUSSION

##### 1. INTRODUCTION OF DASH CAM VIDEO WITHOUT PROPER AUTHENTICATION / CHAIN OF CUSTODY

Prior to trial, Persico became aware that the Commonwealth was in possession of a SIM card purporting to have been from the on-board camera mounted in Tso's vehicle which may have captured the accident in question. Armed with this knowledge, Persico filed a motion in limine to prevent the introduction of that video on

the basis that he did not believe that the Commonwealth could properly authenticate the video as Tso himself was not going to be testifying at trial. At a pre-trial hearing, this Court denied Persico's motion without prejudice to review it should the Commonwealth's not be able to properly authenticate the video at trial.

At trial, Trooper John Blaski testified that Tso gave him a SIM card from his on-board camera which he later entered into evidence at the Pocono State Police Barracks. Trooper Matthew Hunter (hereinafter "Hunter"), an accident reconstruction expert also testified. Hunter relayed that Blaski told him that Tso provided Blaski with the SIM card from his on board camera that was mounted inside his vehicle and that Tso believed that the camera had captured the crash. Hunter went on to testify that he was able to identify a camera inside Tso's vehicle.

Later, as part of his investigation and his efforts to reconstruct the accident, Hunter removed the SIM card from evidence at the Pocono Barracks, took it back to the Hazleton Barracks, made a copy of it, and then analyzed and viewed the video.<sup>2</sup> Hunter noticed that the time stamp on the video of the accident was "off by an hour" but that was typical as people do not remember to

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<sup>2</sup> Hunter testified that there were multiple files on that SIM card and that he had to go through all of them until he found the one depicting the accident.



change it backward or forward with daylight savings time.<sup>3</sup> Hunter went on to say that when he reviewed the video file leading up to the accident, he could observe the roadway, the vehicles and specifically the accident as it occurred.

Persico argues that the Commonwealth should not have been permitted to utilize the video in its case in chief as it could not be authenticated nor could the Commonwealth establish an appropriate chain of custody for the video from its creation to its use at trial.

The Appellate Court addressed this issue in *Commonwealth v. McKellick*, 24 A.3d 982 (Pa. Super. 2011). In *McKellick*, the Court held that a videotape of a vehicle stop from the patrol car of a state trooper, who had tragically passed away before trial and was the only available witness to the incident, was still admissible at trial as the Court found that the Commonwealth had sufficiently authenticated the video through another state trooper. The Court noted that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Pa.R.E. 901(a). It also noted that "demonstrative evidence may be authenticated by testimony from a witness who has knowledge "that a matter is what is claimed to

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<sup>3</sup> Daylight savings time occurred on November 4, 2018, 2 days before the accident.

be." Pa.R.E. 901 (b)(i); *Id* at 986. "The Commonwealth was not required to present the testimony of Trooper Miller at trial in order for it to be admissible. Rather demonstrative evidence may be authenticated by evidence sufficient to show that it is a fair and accurate representation of what it is purported to depict which includes "testimony from a witness who has knowledge" that a matter is what it is claimed to be." *Id* at 988 citing *Commonwealth v. Serge*, 896 A.2d 1170, 1177 (Pa. Super. 2004).

Here, the Commonwealth met this obligation. Blaski testified that Tso gave him the SIM card which came from his on-board camera. He also testified that he placed that card into evidence back at the Pocono Barracks where he is stationed. He also told Trooper Hunter, the accident reconstruction expert that Tso had given him that card which came from his on-board camera. Trooper Hunter testified that Blaski told him about the SIM card and its origin and that as he walked around the accident scene, he observed the aforementioned camera in Tso's car.

Hunter later testified that he retrieved the SIM card from evidence at the Pocono Barracks and made a copy of it for analysis and viewing at his home barracks in Hazleton. Upon viewing, he noticed various files contained thereon and watched them until he "found the ones that were from the date and time of the crash and verified, by looking, by watching the video, verified the location

that was consistent with the crash."<sup>4</sup> As Hunter watched the video, he was able to describe that the video depicted the tunnel located on the Pennsylvania Turnpike and the signage as vehicles approach the Mahoning Valley Exit, signage which he stated he was very familiar with. Hunter further testified that as the video continued to play, he is able to see two vehicles, one vehicle being a green Honda being operated by Gerrity in the left lane and a white minivan in front of Tso in the right lane. Hunter then testifies to the following:

"The video shows the green Honda and the minivan as they travel northbound. The video then comes to the Mahoning Valley Interchange. You can tell it is the interchange because it gets bright because of the lighting that is there. There's no other lighting in between the exits on the turnpike at this location. The video then depicts - you see headlights coming southbound at the vehicles. You will see that the headlights are in the left-hand northbound lane approaching Gerrity's vehicle head-on. His taillights come on as he tries to stop and react. The minivan taillights come on. You see the minivan actually move to the right into the gore area between the lane and the exit. Then you do see the impact between the Audi and the Honda in the lane of travel."<sup>5</sup>

Lastly, Hunter stated that what he observed on that video was consistent with his reconstruction report and how the accident occurred.

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<sup>4</sup> Notes of Testimony, October 17, 2023 p. 116, lines 17-20.

<sup>5</sup> N.T., October 17, 2023 pg. 118-119, lines 15-25 and 1-2.

This Court allowed this video to be admitted and shown to the jury as the Commonwealth had, through the testimony of both Blaski and Hunter, properly authenticated the video on the SIM card in question as a fair and accurate presentation of what it was purported to be: the best evidence of the accident which took the life of Paul Gerrity.

Additionally, this same testimony established the chain of custody from the moment it was created until its presentation in Court. Testimony revealed that: 1) Tso gave it to Blaski, stating that it came from his on-board camera and that he believed it captured the accident; 2) Blaski put it in evidence back at the Pocono Barracks; 3) Hunter retrieved it from evidence at the Pocono Barracks and took it back to the Hazleton Barracks to review, copying the relevant files for use in Court.

The Court agrees with Persico that a break in the chain of custody can render evidence inadmissible however, he neither points to any such breaks nor do we find any such breaks.

Accordingly, the video from the Tso on-board camera was properly admitted into evidence.

## II. MISTRIAL FOR IMPROPER STATEMENT BY PROSECUTOR

In her opening statement at trial, Assistant District Attorney Beck, when discussing the elements she must prove for homicide by vehicle while driving under the influence, stated

"Essentially, I need to show that the defendant was impaired while he was driving, and that the impairment caused the death of Mr. Gerrity. I can do that. I can show you that. You can decide that, but I guarantee I can prove those elements."<sup>6</sup> Shortly thereafter at sidebar, counsel for the Defendant made a motion for mistrial claiming that she was expressing her personal opinion as to the guilt or innocence of the Defendant. After argument, the Court denied the mistrial request and the case then proceeded.

At the conclusion of the evidentiary aspect of the case, the Court held a charge conference. Out of an abundance of caution and believing that it was necessary to do so, the Court prepared a cautionary instruction to address this comment and presented it to the counsel, neither of which had an issue with its wording.<sup>7</sup> Thus, during the closing instruction, the Court read the following cautionary instruction to the jury:

"Now, ladies and gentlemen, any personal beliefs of counsel on either side or any reference guaranteed to you as to what the evidence will show are not supposed to be argued to you or to be considered by you. What you are to pay attention to are the arguments that they make, giving it what credibility you think it is entitled to in accordance with the instructions I am now giving you."<sup>8</sup>

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<sup>6</sup> N.T., October 17, 2023 p.16, lines 10-14.

<sup>7</sup> When asked at the charge conference after the Court gave a copy of its intended cautionary instruction to counsel and asked if either had any issues with it, they both stated "no."

<sup>8</sup> N.T. October 18, 2023, p.158, lines 6-12.

In considering a claim for prosecutor misconduct, the Court's focus is on whether the Defendant was deprived of a fair trial, not a perfect one. *Commonwealth v. DeJesus*, 787 A.2d 394, 407 (2001), cert. denied. 537 U.S. 1028, 123 S.Ct. 580, 154 L.Ed. 2d 441(2002).

"Not every unwise remark on a prosecutor's part constitutes reversible error. Indeed, the test is a relatively stringent one. Generally speaking, a prosecutor's comments do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward [Appellant] so that they could not weight the evidence objectively and render a true verdict. Prosecutorial misconduct, however, will not be found where comments were based on evidence or proper inferences therefrom or were only oratorical flair. In order to evaluate whether comments were improper, we must look to the context in which they were made. Finally, when a trial court finds that a prosecutor's comments were inappropriate, they may be appropriately cured by a cautionary instruction to the jury." *Id.* at 438, 787 A.2d at 407-08 (internal citations omitted).

Additionally, "there is no *per se* rule which requires the grant of a new trial whenever the (prosecution) acts improperly." *Commonwealth v. Clancy*, 192 A.3d 44, 63 (Pa. 2018). Taking it one step further, "[A] mistrial is not necessary where cautionary instructions are adequate to overcome prejudice." *Commonwealth v. Cash*, 137 A.3d 1262, 1273 (Pa. 2016). It is presumed sufficient to cure any prejudice when a cautionary instruction is given. *Commonwealth v. Thornton*, 791 A.2d 1190, 1193 (Pa. Super. 2002).



In *Commonwealth v. Fuller*, 579 A.2d 879 (Pa. Super. 1990), the prosecutor commented in his closing argument that it was "his personal belief that appellant intended to kill the victim." *Id.* at 622. The trial court gave a curative instruction<sup>9</sup> which the appellate court found to be sufficient.

This Court finds no error in denying the mistrial request in light of the curative instruction and the lack of a showing of prejudice.

### III. BLOOD EVIDENCE CHAIN OF CUSTODY

Persico next argues that the Court erred in admitting the blood analysis results into evidence as the Commonwealth failed to establish a reliable chain of custody. Also, Persico claims the prosecution's witness Raymond Garcia's<sup>10</sup> inability to testify about the identity of the person from whom the blood was taken undermined the credibility and reliability of the evidence.

This Court agrees with Persico that Mr. Garcia's testimony in and of itself was suspect in parts and that he clearly was unable to satisfy the Commonwealth's burden of establishing a proper chain of custody of the blood sample taken from Persico and documented

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The curative instruction this Court gave at trial was verbatim to that given by the trial court in *Fuller* dealing with the personal beliefs of the attorneys.

<sup>10</sup> This individual is documented as the person who drew the Defendant's blood five (5) years prior even though he could not recall at trial any of the details of doing so.

as being taken by Garcia. However, it was not Garcia, but rather Crystal Xander (hereinafter "Xander"), a certified scientist at Health Network Labs, who testified as to the policies and procedures pertaining to the chain of custody of Defendant's blood.<sup>11</sup>

The following colloquy took place between the Assistant District Attorney and Xander to explain the procedures in place at Health Network Labs back in 2018<sup>12</sup> and was involved in the certifying of Persico's blood alcohol results as well as the specific chain of custody document pertaining to that blood:

"Q. Crystal, can you walk us through what are the procedures or protocols that are in place at Health Network Labs for ensuring a chain of custody when a blood sample is drawn? Can you walk us through that process?

A. Sure. In this case, the sample came from Lehigh Valley Hospital. I am not sure if it was the Cedar Crest site or 17th or Muhlenberg, but I know it was one of the Lehigh Valley facilities. So Lehigh Valley Hospital is where the sample was collected at, in the emergency department. What happens at the emergency department, I do not know. I do not work there. It's not part of my job description. I can tell you that we have what is called a rapid lab that is run by HNL over in the hospital. That sample goes down to that rapid lab where it is put into a lock box. That lock box gets a little tag on it. It has a special number. That number is written on a paper chain of custody that follows that sample from the emergency room down to the laboratory. Once all that paperwork, that sample, that is all sealed, put into the lock box, that tag with that same number goes on the lock box that if it is broken, it's broken. We are going to know it is broken, because that number then

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<sup>11</sup> See Commonwealth Exhibit 17 for the chain of custody of Defendant's blood.

<sup>12</sup> In 2018, Xander worked for Health Network Labs but she could not recall if she was a technical specialist or certified scientist although when she signed off on Persico results, she did so as a "toxicology certifying scientist" (See Commonwealth Exhibit 19).

also has to match when we receive that at our site on Roble Road. Those numbers have to match. If those two numbers don't match or that lock is broken, we know there's a potential for that sample to have been tampered with. That's one of our security checks.

The sample is delivered via courier from the hospital site to us at the laboratory and it is hand delivered to toxicology. Toxicology is a locked department within the laboratory. Only toxicology personnel have access to the laboratory. That is all part of the forensic rules that we have to follow.

So, we have a doorbell outside. The doorbell rings. Our technical assistant is usually the one that answers the door and receives the specimen and it is handed to that technical assistant. I would have to look at the names on the chain of custody to see if it was the technical assistant or the technician who in this case actually took the specimen, but anybody in the toxicology laboratory is allowed to receive that specimen from our courier services.

Once we have it, it is opened up from that lock box. We check that tag that I was explaining with the number that is written on the chain of custody to make sure they are a match. We look at the sample itself to make sure that the written information on the tube matches all the information on the chain of custody from the emergency room. We then sign that we received that specimen. We make notation if that specimen had the required security seal over the top. It is a tamper evident tape that, again, if there's any kind of tampering, you will see the tape is cracked. It is a very thin film and very easy if you twist that cap just the wrong way, it is going to crack. We are going to know there was a possibility of somebody tampering. We make notation of the seal being intact. We indicate the time and the date that we received the specimen into the laboratory. It is then requisitioned for whatever testing has been requested.

In this case, we received it, the specimen, but there was no testing requested at that point in time. We were later served a search warrant to proceed with testing for drugs and alcohol. During that time, the specimen is in a secured refrigerator, again, locked in our department that only toxicology personnel can access.

Once we received the search warrant, we knew what

testing was required and that testing was ordered. That specimen is then removed from that secure storage and placed into another rack. We have different racks for different testing that we do. It is placed in another rack for a legal blood alcohol and what was called a forensic drug screen that was requested as well. That chain of custody follows that specimen through our laboratory. We also have an internal chain of custody. We have worksheets and work lists that we work off when we set up any kind of analysis in our department. That has signatures, dates, and times of every person who touches that specimen. Who took it out of that refrigerator? Who actually now cracked that seal on that tube? Who entered that tube to take a sample of blood out to do foreign extraction? Who put that sample back into the refrigerator where it was secured? Who looked at the data once it was processed through an analyzer? So we do have that chain of custody that follows every single step of the way as that sample makes its way through our department.

In this case, the sample went through two different processes. It went through a legal blood alcohol process and it went through a drug screening process. So the first person who touches the sample is the name you will see on the main chain of custody. However, like I said, we have an internal chain of custody where we can track anybody else who touched that sample as well until my final name goes on the final report.

Q. Okay. Very in depth. I just want to make sure I am understanding correct. You mentioned a chain of custody, internal paperwork versus other paperwork that is there. I am handing you what's already been marked as Exhibit 17 for the Commonwealth.

A. Yes.

Q. Do you recognize that document?

A. I do.

Q. Okay. Can you explain to us what that is?

A. This is the chain of custody and requisition form from the emergency room at the hospital, Lehigh Valley Hospital.

Q. And can you tell us who is the patient on there and how do you know that?

A. So initially, the patient had what was call a trauma name. It was before an identification of the

patient could be made. The emergency room gives an assigned name for identification purposes on their end.

Q. How is that annotated on this?

A. That is November-ANON, RI A. I cannot state what that means. Like I said, I am not a hospital employee.

Q. That is okay.

A. Then once the individual is identified, it's updated in the computer system, and our computer system works with Lehigh Valley Hospital. So we go in under the medical record number, which is a unique number to each patient who comes into the hospital system, and we are able to look up that medical record to obtain the individual's name.

Q. Okay. And looking at this, if we could go down, because you reviewed this as part of your report that you certify, correct?

A. That is correct.

Q. This is something you would have analyzed?

A. Yes. I would have looked at it. I would have needed information as far as when the specimen was collected, what time it was collected, then also as well as when it was received and what time it was received when I do my final report.

Q. Okay. Could you do me a favor and go the chain of custody as you see it on the paper as you would have analyzed this in order?

A. Sure. So as I said, when the specimen comes to the toxicology department via courier services, it is handed to our TA, or technician or anybody who is a member of the staff of toxicology. They open that lock box. The number for the lock box is written on here. It is a transport container sealed number, in this case 409112. At the bottom of the form where it says for toxicology use only, we then write that number in there because we are comparing it from what is written on this chain of custody to that little white tag that is on that lock box.

In this case, Kim Toth, who was one of our analysts at that time, she is the one who received the specimen into her hands from the courier. She indicated that she received blood with that specific transport seal number. She indicated her name, the date, and the time. She also then indicated that she

placed that sample into secure storage, with the date and the time.

Then the next step is where the technologist, who is the first one to touch it for analysis, indicated that she removed it from storage. In this case, the initials are listed MW. That is later M. West. Her name is Megan West, the date and time. Megan West signed that she was the analyst who performed the testing. She also signed that she is the analyst that put it back into storage.

The chain of custody also includes the individual who collected the specimen over at the emergency room, as well as the police officer responsible for witnessing the collection."<sup>13</sup>

First of all, based upon Xander's testimony, it appears that a chain of custody, from draw to analysis has been established despite Persico's counter-argument that Garcia's testimony left gaps in that chain. In fact, Garcia's testimony could even be totally disregarded (See *Melendez Diaz v. Massachusetts*, 557 U.S. 305 314, 40 A.3d 1250, 1252-53, 129 S.Ct. 2527, 2532 N.1. which states, "We do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of a sample, or accuracy of a testing device, must appear in person as part of the prosecution's case). Fortunately for the Commonwealth, there was sufficient testimony from Xander to establish the chain of custody and the unreliable testimony of Garcia did not negatively impact that burden.

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<sup>13</sup> N.T., October 18, 2023, pp. 54-60.

Lastly, gaps in the chain of custody, if any, go to the weight of the evidence being proffered and not to its admissibility. *Commonwealth v. Cugini*, 452 A.2d 1064, 1065 (Pa. Super. 1982). The weight of the evidence is for the jury to determine, and they are free to believe all, some or none of Xander's testimony.

This Court finds that our ruling to admit the blood analysis report notwithstanding Persico's objection as to the chain of custody was proper and correct.

#### IV. CAUSATION CONNECTION - JURY INSTRUCTION

Persico next argues that the Court erred by "fail[ing] to properly instruct the jury on the critical element of causation", specifically that Homicide by Vehicle while Driving Under the Influence is not a strict liability crime and that the jury was required to find a causal connection between Defendant's intoxication and the fatal accident. This failure mandates a new trial. We disagree that it was not required to specifically state that homicide by vehicle while driving under the influence is not a strict liability crime.

At trial, this Court gave the jury the following instructions derived from Pennsylvania Suggested Standard Jury Instruction 3<sup>rd</sup> Edition tailored to fit this case<sup>14</sup>:

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<sup>14</sup> 17.3735



"Now, the Defendant is charged with homicide by vehicle while driving under the influence. To find the Defendant guilty of this offense, you must first find beyond a reasonable doubt that the Defendant violated one of the provisions of Section 3802 of the vehicle code, which defines the crime of driving under the influence. Shortly, I am going to define those provisions and elements for you. If in your review of the evidence and testimony, you find that it supports a finding that the Defendant violated either of those statutes, or I am sorry, either or both of those sections of the driving under the influence statute, in order to convict the Defendant of homicide by vehicle while driving under the influence, you must then find that the Commonwealth has proven each of the following elements beyond a reasonable doubt. First, that Paul Gerrity is dead. Second, that the Defendant negligently caused the death of Paul Gerrity. A person acts negligently when he should know of a substantial and unjustifiable risk that his conduct will cause serious bodily injury. The risk must be of such a nature and degree that the Defendant's failure to perceive it considering the nature and intent of his conduct and circumstances known to him involves a gross deviation from the standard of care that a reasonable person would observe in the Defendant's situation. The third element that you must find beyond a reasonable doubt is that the Defendant caused the death of Paul Gerrity as a result of his driving under the influence. In order to be a direct cause of the death of Paul Gerrity, the Defendant's conduct must be a direct and substantial factor in bringing it about. There can be more than one direct cause of death, but a Defendant who is a direct cause of it may be criminally liable even though there are other causes. If you find these elements proven beyond a reasonable doubt, you may find the Defendant guilty of homicide by vehicle while driving under the influence. Otherwise, you must find the Defendant not guilty of this offense."<sup>15</sup>

Clearly, while the suggested instruction and our charge did not specifically use the phrase "not a strict liability crime"

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<sup>15</sup> N.T., October 18, 2023, pp. 145-147.



this Court defined the elements of the offense of Homicide By Vehicle While Driving Under The Influence as prescribed by the standard instructions. Specifically, this Court instructed the jury that they must be convinced that the Commonwealth proved beyond a reasonable doubt "that the Defendant caused the death of Paul Gerrity as a result of his driving under the influence" and further it explained what that meant in terms of causal connection. Further, this Court knows of no case that requires the Court to use the phrase "not a strict liability crime" when describing this particular offense and Persico had not provided us with any either. Accordingly, this Court believes that its instruction was appropriate and sufficient to address this concern.

V. WEIGHT/SUFFICIENCY AS TO CAUSAL CONNECTION BETWEEN PERSICO'S INTOXICATION AND THE ACCIDENT LEADING TO GERRITY'S DEATH

Lastly, Persico challenges the jury's verdict relative to the weight given to the evidence and the sufficiency of that evidence as to the charge of Homicide by Vehicle While Driving Under the Influence (75 Pa. C.S.A. §3735(A)).

"The weight of the evidence is exclusively for the finder of fact who is free to believe all, part or none of the evidence and to determine the credibility of the witnesses." *Commonwealth v. Champney*, 832 A.2d 403, 409 (2003), *cert. denied*, 542 U.S. 939, 124 S.Ct. 2906, 159 L.Ed. 2d 816(2004). "Resolving contradictory testimony and questions of credibility are matters for the finder

of fact." *Commonwealth v. Spence*, 290 A.3d 301, 311 (Pa. Super. 2023).

"The standard we apply in reviewing the sufficiency of 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 factfinder 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 that of 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." *Commonwealth v. Hutchins*, 42 A.3d 302, 306-307 (Pa. Super. 2012) citing *Comm. v. Hennigan*, 753 A.2d 245, 253 (Pa. Super. 2000).

"When reviewing a case to determine whether the evidence was sufficient to support the verdict, the evidence must be viewed in the light most favorable to the Commonwealth, and all reasonable inferences therefrom must be drawn in favor of the Commonwealth." *Comm v. O'Neill*, 396 Pa. Super 520, 525 (Pa. Super. 1990) citing *Comm. v. Grayson*, 649 A.2d 593 (1988).

In *Commonwealth v. Tucker*, 106 A.3d 796 (Pa. Super. 2014), the court ruled that, unlike the case of *Commonwealth v. Lenhart*,

553 A.2d 909 (1989) from which the *Tucker* court distinguished itself, it found that there was sufficient evidence presented by the Commonwealth to establish "beyond a reasonable doubt the appropriate nexus between appellant's intoxication while driving and the accident in question." *Id.* at 799. *Tucker* went on to say:

"In *Commonwealth v. Lenhart*, 520 Pa. 189, 553 A.2d 909 (1989), our Supreme Court reversed a conviction for homicide by vehicle while DUI. While the defendant therein was driving under the influence of alcohol, the Commonwealth failed to establish how the accident occurred. Two cars collided on a two-lane highway, and there were no witnesses. The Commonwealth failed to prove that the defendant left his lane of travel since both vehicles were discovered in their own lanes and the debris was evenly distributed between the two side of the road. The Commonwealth proffered no evidence from an accident reconstruction expert or any other expert witness. Given that a factfinder would have to speculate as to whether the defendant left his lane of travel, our Supreme Court held that there was insufficient proof that the defendant's intoxication resulted in the accident and caused the other motorist's death.

The Court observed, "It was stipulated that [the victim] died of injuries suffered in the accident, so the causation in question is whether appellant's drunk driving caused the accident." *Id.* at 911. It noted that typical "forms of proof such as eyewitness testimony, skid marks, or accident reconstruction expert testimony, were entirely absent from this case," and that it was pure speculation as to whether the defendant went into the oncoming lane of traffic to strike the other car. *Id.* It ruled, "The scanty evidence of record in this case simply fails to prove that appellant caused the accident." *Id.* at 912. It therefore vacated the defendant's conviction under §3735.

Herein, there was clear and unequivocal testimony regarding who was responsible for the collision. Ms. Van Horn outlined that Appellant was in the incorrect lane of travel, as supported by the location of the vehicles

after the accident, and drove head-on into her car. There also was sufficient evidence to establish, beyond a reasonable doubt, that Appellant's intoxication with MDPV was the reason that he operated his car in that manner.

Appellant was traveling down a road in broad daylight and admittedly could not explain why he went into the wrong lane. After Mr. Van Horn alerted him to the peril by sounding her horn, Appellant did not respond. He neither slowed his pickup truck nor swerved to avoid her car. After the wreck, Appellant displayed bizarre behavior. He approached the victim, stared at the screaming woman, and returned to his truck, and made no effort to comfort or aid her. Appellant admitted that, when he first started to travel, he actually went in the wrong direction to reach his stated destination. He was confused, lethargic, slurred his speech, and had glassy and bloodshot eyes. These circumstances established beyond a reasonable doubt that the MDPV caused Appellant's behavior and the accident in question." *Id.*

The case *sub judice* factually mirror *Tucker* as far as evidence of how the accident occurred in that the evidence showed Persico's vehicle was in the wrong lane, of travel, supported by both Hunter's accident reconstruction testimony and report and Tso's on-board camera video and that his vehicle struck Gerrity's head-on, from which Gerrity perished. Other evidence presented shows that Persico had a blood alcohol content of .22 a little over an hour after the accident and that a partially empty bottle of Pinnacle Vodka was found in his vehicle.

In determining whether a defendant's conduct is a direct factor in the death of someone else, the courts have stated that "so long as the defendant's conduct started the chain of causation

which lead to the victim's death, criminal responsibility for the crime [of Homicide By Vehicle While Driving Under Influence] may properly be found." *Commonwealth v. McCloskey*, 835 A.2d 801, 807-08 (Pa. Super. 2003).

In *Commonwealth v. Johnson*, 545 A.2d 349, 353 (Pa. Super. 1988), the court noted:

"Appellant argues also that the evidence was insufficient to prove that driving while under the influence of alcohol was the legal cause of the victim's death. Because people who are not under the influence of alcohol was a cause of the accident. We reject this argument. The evidence, as we have observed, was sufficient to show that appellant was under the influence of alcohol so as to be incapable of safe driving at the time of the accident. The evidence also showed that appellant was involved in a fatal accident under circumstances demonstrating that he was at fault in causing eh same. These circumstances were sufficient to permit a finding that appellant's violation of the proscription against driving while under the influence of alcohol was a legal cause of the accident. Whether a fatality would not have occurred but for appellant's being under the influence of alcohol was, under the circumstances, a question for the trier of the facts. *Commonwealth v. Hicks*, 466 Pa. 499, 504, 353 A.2d 803, 805 (1976)."

It is within the purview of the jury to make reasonable inferences from the testimony presented. While the Court determined Persico's guilt on the Driving Under the Influence charge<sup>16</sup>, the jury was required to determine independently if

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<sup>16</sup> This charge was considered a first offense, an ungraded misdemeanor to which the Defendant was entitled to a jury trial.

Persico was in fact driving under the influence. Here, the jury could reasonably infer that with the fact that Persico's blood alcohol content was .22 his judgment was impaired, and as a result he travelled southbound in the northbound lane of the turnpike which in turn caused a fatal accident. Thus, this jury weighted the evidence presented, gave it the reliability and credibility they felt it was entitled and determined that it was sufficient to establish the requisite nexus between the intoxication of Persico and the death of Gerrity. There is no reason to disturb this verdict.

#### CONCLUSION

Based on the foregoing, this Court denies Persico's Post-Sentence *in toto*.

BY THE COURT:

  
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Joseph J. Matika, J.