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

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| **COMMONWEALTH OF PENNSYLVANIA** | : | |
| | : | |
| **vs.** | : | **No. 1025 CR 2012** |
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| **ARDEN C. OLDT, III,** | : | |
| **Defendant/Appellant** | : | |

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| Sarah E. Modrick, Esquire | Counsel for Commonwealth<br>Assistant District Attorney |
| Tommaso V. Lonardo, Esquire | Counsel for Defendant |

**MEMORANDUM OPINION**

Matika, J. – April , 2014

Following a bench trial, this Court found the Defendant, Arden C. Oldt, III, guilty of driving under the influence of alcohol,[1] and reckless driving.[2] Defendant now appeals the judgment of sentence this Court imposed for these offenses. This memorandum opinion is filed in accordance with Pennsylvania Rule of Appellate Procedure 1925(a). For the reasons stated below, this Court respectively requests that Defendant's judgment of sentence be affirmed.

**FACTUAL AND PROCEDURAL BACKGROUND**

The facts underlying Defendant's convictions established that on August 2, 2012, Defendant was driving erratically on State Route 248 in Carbon County, Pennsylvania. Defendant's

[1] 75 Pa.C.S.A. § 3802(a)(1).

[2] 75 Pa.C.S.A. § 3736(a).

driving caused a three-car accident involving himself, Gary Dimovitz (hereinafter "Dimovitz"), and Larry Mosser (hereinafter "Mosser"). After investigating the accident, the officer called to the scene, Officer Robert Cohowicz, arrested Defendant for suspicion of drunk driving after: 1) he detected an odor of alcohol emanating from Defendant; 2) Defendant readily admitted that he drank three beers the day of the accident, including one beer a mere one hour before; and 3) Defendant failed a standardized field sobriety test.

At trial, both Dimovitz and Mosser offered similar accounts of the accident. Dimovitz testified that on the day of the accident he was driving a silver BMW westbound on State Route 248. (N.T. 8/9/13 at 5).[3] Construction on Route 248 caused the right-hand lane of the highway to be closed; all traffic had to proceed in the left-hand lane. (*Id.* at 5-6). To close the right lane, a construction crew had tapered off cones to prevent a driver from entering the right-hand lane. These cones then continued down the highway, partitioning the two westbound lanes. This closed right-hand lane caused traffic to move slowly through the construction zone.

While proceeding through the construction zone, Dimovitz observed the Defendant driving a black Mercedes convertible

[3] State Route 248 is a four-lane highway with a concrete Jersey barrier dividing the east and westbound lanes. (N.T. 8/9/13 at 67-68).

directly in front of him. About halfway through the construction zone, Dimovitz observed Defendant drive through the construction cones into the closed right-hand lane. (*Id.*). According to Dimovitz, Defendant was able to navigate through the cones and proceed down the right-hand lane because, at Defendant's point of entry into the right-hand lane, all construction workers and vehicles were behind him. (*Id.* at 21).[4] Once in the right-hand lane, Defendant accelerated in an attempt to pass the line of cars slowly traveling through the construction zone in the left-hand lane.

Unlike the beginning of the construction zone where the entrance was tapered off, the end of the construction zone was not tapered off with cones. (*Id.* at 23). Thus, as vehicles started to exit the construction zone they were able to merge back into the right-hand lane. (*Id.* at 12). When Defendant reached the end of the construction zone, he was forced to apply his brakes as other vehicles were merging into the right-hand lane and preventing him, the Defendant, from exiting that lane (*Id.*). Observing Defendant apply his brakes, Dimovitz assumed Defendant wanted to merge back into the left-hand lane to pass the line of traffic. (N.T. 8/9/13 at 12-13). Consequently, Dimovitz slowed his vehicle, allowing Defendant to cross back

[4] The construction work being performed was not to repair the road itself but rather for work being done on the adjacent retaining wall. (N.T. 8/9/13 at 22).

into the left-hand lane. (*Id*. at 13). Once Defendant re-entered the left-hand lane, he was faced with clear and open road ahead of him, but Defendant traveled slowly as if he was still in the construction zone. (*Id*.). Dimovitz then observed Defendant stick his hand out the window, wave, and accelerate ahead. (*Id*. at 14).

Up ahead, about one-half mile past the construction zone, Dimovitz noticed Defendant's brake lights as he, the Defendant, moved back into the right-hand lane. (*Id*. at 14). Since Defendant was approaching the Palmerton exit on Route 248, Dimovitz assumed that Defendant was about to exit the highway. However, his assumption was incorrect because after Dimovitz passed the exit, as well as the ramp for traffic coming onto Route 248 from Palmerton, Dimovitz now noticed, in his rearview mirror, that Defendant was back in the left-hand lane some distance behind him. (*Id*. at 14-15, 19).[5]

As Dimovitz continued past the traffic in the right-hand lane, he took another quick glance into his rearview mirror and noticed that Defendant had closed the gap between them. (N.T. 8/9/13 at 19).

Shortly thereafter, as Dimovitz passed the last car in the right-hand lane, Defendant's vehicle struck Dimovitz's vehicle.

[5] Dimovitz asserted that up until the accident he was only traveling in the left-hand lane, and had, without noticing, passed Defendant's vehicle. (N.T. 8/9/13 at 24).

The impact caused Dimovitz to slightly lose control of his vehicle, but he was quickly able to regain control. (*Id.* at 7). Thereafter, Dimovitz looked into his rearview mirror and noticed that Defendant's vehicle had collided with the median. (*Id.* at 16).[6] After noticing that Defendant had collided with the median, Dimovitz pulled over onto the right-hand shoulder and called 911. (*Id.*).

Like Dimovitz, Mosser testified that on August 2, 2012, he was also traveling westbound on Route 248. (*Id.* at 35). While traveling down the highway, Mosser noticed in his rearview mirror two vehicles approaching him from behind. (*Id.*).[7] As these vehicles approached him, Mosser described Defendant as driving as if Mosser was not even on the road. (N.T. 8/9/13 at 35).[8] Conversely, Mosser did not perceive the other vehicle, driven by Dimovitz, as a threat to him.

Accordingly, Mosser, who was already in the right-hand lane, slowed his vehicle and moved onto the shoulder of the highway in an attempt to allow both vehicles to pass him; however, he was not able to get completely off the road due to a

[6] Dimovitz stated that since there were other vehicles in the right-hand lane, he could not move over into the right-hand lane to allow Defendant to pass him. (N.T. 8/9/13 at 27).

[7] Mosser stated that despite setting his cruise control to sixty-two (62) miles per hour in a fifty-five (55) mile per hour zone, both vehicles were rapidly drawing near him. (N.T. 8/9/13 at 38).

[8] As Defendant approached in his black Mercedes convertible, Moser was able to identify the operator of the vehicle as a male later learned to be the Defendant. (N.T. 8/9/13 at 38).

guide rail. (*Id.*). As Defendant approached Mosser, his vehicle began to swerve. When Defendant attempted to pass Mosser, Defendant's vehicle struck the left rear panel of Mosser's vehicle. (*Id.*). Upon collision, Defendant's vehicle veered hard to the right, struck the guide rail which then caused Defendant's vehicle to travel back across the two lane highway and into the median separating the westbound lanes from the eastbound lanes. (*Id.* at 36).

Once his vehicle was at rest, Mosser approached Defendant to inquire into whether or not he was injured. Defendant stated that he was fine; he then apologized for causing the accident. (*Id.* at 40, 41).

Responding to Dimovitz's 911 phone call, Officer Cohowicz, of the Palmerton Borough Police Department arrived at the accident scene.[9] Upon arrival, Officer Cohowicz observed that just past Mosser's vehicle were skid marks on the road leading up to Defendant's vehicle that was resting against the median. (*Id.* at 68).

Officer Cohowicz observed a group of individuals, which included the Defendant, a female who was later identified as being a passenger in the car driven by Defendant, and Mosser, standing around Defendant's vehicle. (N.T. 8/9/13 at 69, 90).

[9] Officer Cohowicz was working alone that day. (N.T. 8/9/13 at 66).

According to the Officer, he ushered them off the road so he could safely speak with them about the accident. While speaking with this group, Officer Cohowicz detected an alcoholic odor emanating from the group; however, at this time, he could not determine the source of this odor. (*Id.* at 69).

In response to Officer Cohowicz's questions about the accident, Defendant stated that he was the driver of the black Mercedes convertible. The Officer then asked if Defendant had sustained any injuries in the accident or needed any medical treatment; Defendant told the Officer that he was fine and did not need medical attention. (*Id.* at 70, 71).[10]

After learning that Defendant was the driver of the black Mercedes convertible, the vehicle that sustained the most damage, Officer Cohowicz asked Defendant to step away from the group so they could speak in private. Upon exiting the group, Officer Cohowicz became aware that the odor of alcohol he previously detected was emanating from the Defendant. (*Id.* at 71). Additionally, Officer Cohowicz noticed that Defendant's eyes were glossy and bloodshot. (*Id.* at 72).[11] Perceiving these conditions, Officer Cohowicz asked Defendant if had consumed any

[10] Defendant's female passenger suffered an injury to her hand that did required medical attention. (N.T. 8/9/13 at 70). Accordingly, the Officer radioed for medical assistance. *Id.*

[11] Officer Cohowicz also noted that Defendant was sweaty and nervous; however, it was very hot on this day and the Officer did acknowledge on cross-examination that the Defendant was in an accident moments ago. (N.T. 8/9/13 at 94).

alcoholic beverages earlier in that day. (*Id.* at 72, 73). Defendant readily admitted that he consumed three twelve-ounce cans of beer, consuming the last beer a mere hour before the accident. (N.T. 8/9/13 at 72-73). Based upon this admission, Officer Cohowicz asked Defendant to submit to a standardized field sobriety test to which Defendant agreed. (*Id.* at 75).

Before Defendant performed the test, in light of the recent accident, Officer Cohowicz asked Defendant if he was physically able to perform the test. (*Id.*). Defendant responded in the affirmative. (*Id.* at 74-75). Officer Cohowicz then inquired of Defendant if he had any physical ailments or disabilities that would affect his performance. (*Id.* at 75). Defendant responded in the negative. (*Id.*). Lastly, Officer Cohowicz asked Defendant if he could normally keep his balance. (N.T. 8/9/13 at 74-75). Defendant responded in the affirmative. (*Id.* at 75). Based on these answers, Officer Cohowicz found Defendant medically capable of performing a standardized field sobriety test.

Thereafter, Officer Cohowicz had Defendant perform a three-phase field sobriety test; however, during the second phase, which was the nine-step walk and turn, Officer Cohowicz stopped Defendant due to his lack of coordination as the Officer had to catch Defendant in order to prevent him from falling to the ground. (*Id.* at 76).

After Officer Cohowicz stopped the test, Defendant, for the first time, started to proclaim that he was feeling dizzy and had left knee pain. (*Id.* at 76).[12] In listening to the Defendant complain of left knee pain, Officer Cohowicz had Defendant sit on the guide rail and await the arrival of medical personnel; however, when medical personnel arrived Defendant refused any treatment. (*Id.* at 77).

Based upon his education, training, and experience, and his observations of the Defendant, Officer Cohowicz placed the Defendant into custody for the suspicion of driving under the influence of alcohol. (*Id.* at 83). Defendant was ultimately charged with one count of driving under the influence of alcohol, highest rate of blood alcohol content,[13] one count of driving under the influence of alcohol, incapable of safe driving,[14] one count of unlawful possession of fireworks,[15] one count of traveling in excessive speed,[16] and one count of reckless driving.[17]

A non-jury trial was held on these charges on August 9,

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[12] It is noted that not until after Officer Cohowicz stopped the test that the Defendant stated he was experiencing left knee pain. (N.T. 8/9/13 at 75-76).

[13] 75 Pa.C.S.A. § 3802(c).

[14] 75 Pa.C.S.A. § 3802(a)(1).

[15] 35 Pa.C.S.A. § 1275.

[16] 75 Pa.C.S.A. § 3362(a)(2).

[17] 75 Pa.C.S.A. § 3736(a).

2013, and after hearing the above stated evidence, this Court found the Defendant guilty of driving under the influence of alcohol, incapable of safe driving, and reckless driving. Defendant was acquitted of the remaining charges.[18] Thereafter, the Court sentenced Defendant to a period of incarceration in the Carbon County Correctional Facility for a period of not less than forty-eight hours, nor more than six months. Additionally, Defendant's driver's license was suspended for one year.

Subsequently, Defendant filed a post-sentencing motion asking this Court to re-examine the evidence, claiming that the evidence was insufficient to sustain the convictions, or, in the alternative, order a new trial. After a hearing on this motion, this Court denied his request. Defendant then appealed his judgment of sentence. This Court, thereafter, issued an order requesting that Defendant file a concise statement of matters complained of on appeal within twenty-one days. In his concise statement, Defendant raises numerous issues. This Court finds that these issues can be reduced to the following four issues that are:

1) The Commonwealth failed to present sufficient evidence to support this Court's finding that

[18] At the close of the Commonwealth's case-in-chief, Defendant made a motion in the nature of demurrer to count one of the information, driving under the influence with the highest rate of blood alcohol content. Based on the evidence presented to the Court as it relates to the testing of Defendant's blood, and in following the holding of *Commonwealth v. Karns*, 50 A.3d 158 (Pa. Super. Ct. 2012), the Court granted Defendant's motion and dismissed this count.

Defendant is guilty, beyond a reasonable doubt, of driving under the influence of alcohol to such a degree that it rendered him incapable of safe driving, identified as count II on the information;

2) The weight of the evidence did not support this Court's finding of guilt that the Defendant was driving under the influence of alcohol to such a degree that it rendered him incapable of safe driving and thus his conviction for violating 75 Pa.C.S.A. § 3802(a)(1) should be vacated;

3) This Court's finding that the Defendant was guilty of reckless driving, a violation of 75 Pa.C.S.A. § 3736 should be vacated as a result of the Commonwealth failing to proffer sufficient evidence on this charge; and

4) The weight of the evidence presented in this matter does not substantiate this Court's finding that the Defendant is guilty of reckless driving.

The Court will address these issues accordingly.

## DISCUSSION

### I. Failure to File the Concise Statement in a timely manner with the Clerk of Courts and serve a copy upon the Court

Before addressing the merits, or lack thereof, of Defendant's issues raised on appeal, the Court feels compelled to note that Defendant failed to timely file his concise statement as prescribed by this Court's order dated March 10, 2014. Accordingly, this Court believes that these issues raised by Defendant on appeal are not properly preserved and thus waived.

The Supreme Court of this Commonwealth held in *Commonwealth*

*v. Lord*, 719 A.2d 306 (Pa. 1998), "from this date forward, in order to preserve their claims for appellate review, [a]ppellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Rule 1925. Any issues not raised in a 1925(b) statement will be deemed waived." *Id.* at 309. A recent Superior Court decision ruled that the intended holding in *Lord* was to create "a bright-line rule, such that 'failure to comply with the minimal requirements of Pa.R.A.P. 1925(b) will result in automatic waiver of the issues raised.'" *Greater Erie Industrial Development Corp. v. Presque Isle Downs, Inc.*, 2014 PA Super 50, 2014 WL 930822 (2014)(quoting *Commonwealth v. Schofield*, 888 A.2d 771, 774 (Pa. 2005))(emphasis in original). The Superior Court went on to state that, "it is no longer within [the Superior] Court's discretion to ignore the internal deficiencies of Rule 1925(b) statements." *Greater Erie Industrial Development Corp*, 2014 WL 930822 at *2. "Whenever a trial court orders an appellant to file a concise statement of matters complained of on appeal pursuant to Rule 1925(b), the appellant must comply in a timely manner." *Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 803 (Pa. Super. Ct. 2007)(citing *Commonwealth v. Castillo*, 888 A.2d 775, 780 (Pa. 2005))(emphasis in original).

In the case *sub judice*, this Court issued an Order of Court on March 10, 2014, directing the Defendant to file a concise

statement within twenty-one (21) days from the date of that order. Moreover, the order specifically states that any issue not properly preserved in this concise statement will be deemed waived. Accordingly, Defendant's concise statement was required to be filed with the Carbon County Clerk of Court's Office, and served upon this Court, no later than March 31, 2014. However, Defendant did not serve nor was his concise statement docketed by the Clerk of Court's until April 2, 2014.

Pennsylvania Rule of Appellate Procedure 1925 sets forth the filing and service requirements an appellant must comport with in filing his or her concise statement. Said rule reads, in relevant part:

> Appellant shall file of record the Statement and concurrently shall serve the judge. Filing of record and service on the judge shall be in person or by mail as provided in Pa.R.A.P. 121(a) and shall be complete on mailing **if appellant obtains** a United States Postal Service Form 3817, Certificate of Mailing, or other similar United States Postal Service form from which the date of deposit can be verified . . . . Service on parties shall be concurrent with filing and shall be by means of service specified under Pa.R.A.P. 121(c).

Pa.R.A.P. 1925(b)(1)(emphasis by the Court). The Court does acknowledge that Defendant did file a certificate of service, dated March 30, 2014, claiming that his concise statement was mailed to all relevant parties by first class mail as permitted by Pennsylvania Rule of Appellate Procedure 121(c). However, Defendant has failed to proffer to the Court any

evidence as prescribed in the rule, that being a United States Postal Service form 3817, a certificate of mailing, or any other similar United States Postal Service form where the date of deposit can be verified. Accordingly, Defendant has failed to file any suitable documentation to authenticate his certificate of service's claim that the concise statement was placed in the mail, and thus considered filed of record, within the twenty-one day timeframe as prescribed by this Court's order of March 10, 2014.[19]

As a result of Defendant failing to timely serve this Court and Clerk of Court's with his concise statement in accordance with Pennsylvania Rule of Appellate Procedure 1925, he has not complied with the terms of this Court's Order dated March 10, 2014. Consequently, this Court concludes that Defendant has waived his right to appellate review and his appeal should be quashed.

Nonetheless, if the Honorable Superior Court finds such error to be *de minimus* and therefore finds it appropriate to address the merits of the issues Defendant has raised on appeal, this Court respectfully recommends that the appeal be denied and this Court's judgment of sentence affirmed.

[19] This Court also notes that the Defendant's cover letter attached to his concise statement, which states that the original Concise Statement of Matters Complained of on Appeal is enclosed, is dated April 1, 2014, thus creating a conflict as to the specific day Defendant deposited his concise statement in the mail.

## II. Driving Under the Influence of Alcohol to such a degree that Defendant was rendered incapable of safe driving

### A. *Sufficiency of the evidence presented by the Commonwealth*

Defendant's first issue on appeal challenges the sufficiency of the evidence contending that the Commonwealth failed to proffer adequate evidence for this Court to find that Defendant was guilty, beyond a reasonable doubt, of driving under the influence of alcohol to such a degree that it rendered him incapable of safe driving. The standard of review for a challenge to the sufficiency of the evidence is well-settled:

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

*Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000) (internal citations, footnotes, and quotation marks omitted). Given the standard the Court must apply to a sufficiency of the evidence challenge, the Court finds Defendant's challenge to the verdict meritless.

To be found guilty of driving under the influence of alcohol to a degree that it renders one incapable of safe driving, the Commonwealth must prove: 1) that the defendant was the operator of a motor vehicle, and 2) that while operating the vehicle, the defendant was under the influence of alcohol to such a degree as to render him or her incapable of safe driving. *Commonwealth v. Kelley*, 652 A.2d 378, 875 (Pa. Super. Ct. 1994). In proving the second element of the crime, the evidence presented must show that alcohol had substantially impaired the normal mental and physical features required to safely operate the vehicle. *Commonwealth v. Montini*, 712 A.2d 761, 768 (Pa. Super. Ct. 1998). As it relates to this offense, substantial impairment means a diminution or enfeeblement in the ability to exercise judgment, to deliberate, or to react prudently to changing circumstances and conditions. *Id.* Evidence that the operator of the vehicle was not in control of himself, such as failing to pass a field sobriety test, may establish that the operator of the vehicle was under the influence of alcohol to such a degree that it rendered him or her incapable of safe driving, notwithstanding the absence of evidence of erratic or unsafe driving. *Commonwealth v. Feathers*, 660 A.2d 90, 95 (1995) *aff'd* 683 A.2d 289 (Pa. 1996).

The direct testimony of Dimovitz and Mosser established that Defendant was the operator of the black Mercedes on August

2, 2012. Moreover, the defense's lone witness, Michelle Everett who was the female passenger in Defendant's vehicle during the day at issue, also testified that the Defendant was driving the vehicle prior to the accident. (N.T. 8/9/13 at 173). Thus, the evidence established that the Defendant was the operator of the motor vehicle in question on August 2, 2012.

The Commonwealth, in proving that Defendant was operating his vehicle while under the influence of alcohol to such a degree that it rendered him incapable of safe driving, presented the testimony of Dimovitz and Mosser. Both witnesses described Defendant's driving prior to the accident which can only be characterized as erratic. Dimovitz observed Defendant, while in the construction zone, travel through the cones that were designed to separate traffic in the left-hand lane from the right-hand lane where construction work was taken place. Once Dimovitz observed Defendant in the right-hand lane, he noticed that the Defendant then accelerated his speed in an attempt to pass the line of traffic properly travelling in the left-hand lane. Thereafter, as testified to by Dimovitz, the Defendant exited the construction zone and returned to the left-hand lane with a clear road ahead of him. Once in the left-hand lane, and with Dimovitz directly behind him, Defendant traveled at a slow rate of speed as if he was still in the construction zone, and

then suddenly wave to the traffic behind him and quickly accelerated ahead.

Mosser, who was up ahead of both Defendant and Dimovitz, stated that he noticed both drivers in his rearview mirror rapidly gaining ground on him despite him, Mosser, traveling sixty-two miles per hour in a fifty-five miles per hour zone. Moreover, Mosser testified that the manner in which Defendant was driving created a threat to him such that Mosser felt it was necessary to move over to the far right of the traffic lanes and up against the guide rail in an attempt to allow Defendant to pass him.

The Commonwealth also presented the testimony of Officer Cohowicz who was the officer on scene. The Officer testified that upon contact with the Defendant, he detected an odor of alcohol emanating from him. The Officer also noticed Defendant's eyes to be glossy and bloodshot. Defendant then admitted to the Officer that he had been drinking no less than an hour prior to the accident. Thereafter, the Officer witnessed Defendant fail a standardized field sobriety test. Accordingly, the Officer, based upon his knowledge, training, and experience of approximately eighty DUI arrests, opined that the Defendant was driving under the influence of alcohol to such a degree that he was incapable of safe driving.

In *Commonwealth v. McGinnis*, 515 A.2d 847 (Pa. 1986), the Pennsylvania Supreme Court held that testimony of a police officer that he observed the operator of a vehicle have glassy and slightly bloodshot eyes, the odor of alcohol present upon him, and the driver acting in a belligerently manner was insufficient to find that the driver was under the influence of alcohol. *Id.* at 850. The rationale of the Court was that testimony was necessary concerning the driver's ability, or inability, to walk, potential slurred or incoherent speech, or poor performance on a physical coordination test in order to find that the driver of the vehicle was under the influence of alcohol to a degree that rendered him incapable of safe driving. *Id.* at 850-51.

In following the *McGinnis* Court's directive, the Superior Court in *Commonwealth v. Kowalek*, 647 A.2d 948 (Pa. Super. Ct. 1994), upheld the conviction of a defendant for driving under the influence where the trooper provided testimony that the defendant had a strong odor of alcohol about him and bloodshot eyes. *Id.* at 952. More importantly, the *Kowalek* Court noted that the defendant was unable to stand on one foot for more than three seconds, which, in following the *McGinnis* Court's rationale, is exactly the additional testimony necessary to establish a *prima facie* case that defendant was under the

influence of alcohol to such a degree that it rendered him incapable of safe driving. *Id.*

For similar reasons as the cases just cited, this Court concluded that the Commonwealth presented sufficient evidence to establish, beyond a reasonable doubt that Defendant was driving under the influence of alcohol to such a degree that it rendered him incapable of safe driving. Defendant's erratic driving led to an accident,[20] Officer Cohowicz noticed Defendant's eyes were red and bloodshot, and detected an odor of alcohol emanating from Defendant. Moreover, Defendant was administered the first phase of what was to be a three phase field sobriety test, but the Officer had to stop the second phase based upon poor performance and lack of coordination. Based upon Officer Cohowicz's knowledge, training, and experience, and his observations of the Defendant, he was able to opine that the Defendant was driving under the influence of alcohol to such a degree that he was unable to safely drive.

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[20] In characterizing Defendant's driving as erratic, the Court points to Defendant's decision to ignore the construction cones blocking traffic from proceeding into the right-hand lane where construction was taken place. Defendant, while in an active construction zone and unaware if there were construction workers or construction equipment up ahead of him, increased his speed in hopes of passing the line of traffic in the left-hand lane. Further, once past the construction zone, Defendant was traveling at such a high rate of speed that he was swiftly closing the distance between him and Mosser, despite Mosser already traveling over the speed limit.

Lastly, after Dimovitz passed Defendant on Route 248, Defendant increased his rate of speed in an attempt to catch up to Defendant. Consequently, Defendant's driving, as acknowledged by himself, caused a three car accident whereby Defendant's vehicle made contact with Dimovitz's vehicle, which lead to Defendant colliding into Mosser's vehicle. The totality of these facts is suggestive of impaired judgment or a judgment jaded by alcohol consumption.

In *Feathers*, the Superior Court in upholding jury's finding that the driver was driving under the influence of alcohol held that where a police officer has observed defendant's appearance and acts, that officer is competent to express an opinion as to the defendant's state of intoxication and ability to drive safely. *Feathers*, 660 A.2d at 95-96. The police officer, who provided testimony that was not contradicted by the defense, testified that he noticed defendant's eyes were red and bloodshot, and there was a strong odor of alcohol emanating from the defendant. *Id.* at 96. Moreover, the defendant admitted to consuming alcohol earlier in the night and performed very poorly on the field sobriety test. *Id.* The Court ruled that based on the officer's training, experience, and observations, the evidenced proffered by the Commonwealth was sufficient to sustain defendant's DUI conviction. The facts presented in this matter are analogous to the facts in *Feathers*, and thus the Court found Defendant was guilty for driving under the influence of alcohol.

Defendant, at the argument on his post-sentencing motions and in his concise statement argues that the evidence, examined in a vacuum, is insufficient to establish that he was driving under the influence of alcohol to such a degree that he was incapable of safe driving. Although the Court would agree that the facts, if examined in isolation, would not satisfy the

Commonwealth's burden, however, such method in evaluating all the evidence in this matter is improper. The Pennsylvania Supreme Court stated in *Commonwealth v. Griscavage*, 517 A.2d 1256 (Pa. 1986), that a court must evaluate all the evidence in the aggregate. *Id.* at 1258. The *Griscavage* Court overturned the Superior Court's finding that the evidence did not support Defendant's conviction of DUI where the Superior Court "chose to atomize the evidence, [and consider] each piece in isolation without relation to the whole picture." *Id.*

Accordingly, much to the dismay of the Defendant, this Court examined all relevant and admissible pieces of evidence and all the testimony offered to the Court in conjunction with each other in reaching its final conclusion that the Defendant was under the influence of alcohol and unable to safely drive as a result thereof.

Lastly, Defendant in his concise statement makes bald statements that this Court considered the blood alcohol test results in its determination that Defendant was guilty of driving under the influence. Not only are such statements as erratic as Defendant's driving on August 2, 2012, they are meritless. In fact, this Court dismissed count one of the information because the blood alcohol test was only performed on the supernatant and not on Defendant's whole blood. *See*, *Commonwealth v. Karns*, 50 A.3d 158 (Pa. Super. Ct. 2012),

Accordingly, without an expert to perform the proper conversion from a reading of the supernatant to whole blood, this Court granted Defendant's request to dismiss count one. *See*, *Commonwealth v. Haight*, 50 A.3d 137 (Pa. Super. Ct. 2012). Consequently, the Court did not consider such evidence in its deliberations. To argue that the Court considered the blood alcohol test results without evidence of such calls into question the integrity of the Court and is improper.

As a result, Defendant's argument on appeal that the Commonwealth failed to provide sufficient evidence to support the verdict is meritless and should be dismissed.

*B. Weight of the evidence*

Defendant's second challenge to this Court's finding that he was driving under the influence to such a degree that he was incapable of safe driving is that the weight of the evidence presented at trial is contrary to the verdict.

> A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. [A] new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. Stated another way, . . . the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court.

Commonwealth v. Sullivan, 820 A.2d 795, 806 (Pa. Super. Ct.

2003) (citations, quotation marks, and emphasis omitted).

As stated above, the Commonwealth presented the testimony of Mosser and Dimovitz who both testified as to Defendant's erratic driving and the cause of the three vehicle accident. The Commonwealth also offered Officer Cohowicz's testimony. Officer Cohowicz, based upon his training, experience, and observations of the Defendant, that being the odor of alcohol present on his person and he had red, bloodshot eyes, along with the Defendant's admission to consuming alcohol no more than an hour ago and Defendant's inability to perform a standardized field sobriety test, concluded that Defendant was driving under the influence of alcohol to such a degree that it rendered him incapable of safe driving.

The defense offered the testimony of Michelle Everett who was the passenger in Defendant's vehicle and was with the Defendant earlier in the day. Ms. Everett acknowledged that the Defendant was the driver of the black Mercedes and that he had consumed alcohol earlier in the day. (N.T. 8/9/13 at 171). Defense witness also stated that she and the Defendant left Defendant's work office and arrived at a bar sometime after three o'clock, and moreover, they did not have their first drink until sometime thereafter. *Id.* at 181-82. The witness also testified, on cross-examination, that while at this bar the Defendant had at least two beers and acknowledged that she was

not with him the entire time while at this bar.[21]

The Court, in considering Ms. Everett's testimony in conjunction with that of Officer Cohowicz's, was able to deduce that the Defendant had at least two to three beers in an hour and half timeframe. Accordingly, taking into consideration the standard the Court must apply, that being to examine the evidence in the light most favorable to the Commonwealth, and in consideration of the totality of the evidence present by the Commonwealth and that of defense in the form of Ms. Everett, Defendant's argument that the weight of the evidence does not support this Court's verdict as it relates to count two, driving under the influence of alcohol, is meritless and should be dismissed.

**III. Reckless Driving**

*A. Sufficiency of the evidence presented by the Commonwealth*

Defendant's third issue raised on appeal challenges the sufficiency of the evidence presented by the Commonwealth as it relates to the reckless driving offense, identified as count five on the information. More specifically, Defendant contends that the influence of an intoxicating substance does not

[21] As stated earlier, the Defendant admitted to the Officer that he, the Defendant, consumed three beers; however, Defendant told the Officer he consumed said beers over a four hour time period with the last beer being consumed an hour prior to the accident. Given the testimony by Ms. Everett, the Court found such claim to the Officer a contradicting since Ms. Everett testified that they did not arrive at the bar until after three o'clock and the accident occurred sometime before five in the afternoon.

establish recklessness *per se* for purposes of this offense and additionally the Commonwealth has failed to establish the necessary *mens rea* for this offense.

The Court has already stated the applicable legal standard as it relates to a sufficiency of the evidence challenge. Based upon such standard, the Court finds that the Defendant's challenge to this offense should be denied.

To satisfy the elements of reckless driving, the offender's driving must be a gross departure from prudent driving standards. *Commonwealth v. Greenberg*, 885 A.2d 1025 (Pa. Super. Ct. 2005). For one to be convicted of reckless driving, the Commonwealth must satisfy both elements. These two elements are: 1) the *actus reus*, driving a vehicle; and 2) the *mens rea*, "in willful or wanton disregard for the safety of persons or property." *Commonwealth v. Bullick*, 830 A.2d 998 (Pa. Super. Ct. 2003)(citing 75 Pa.C.S.A. § 3736(a)). "A person acts recklessly if he or she consciously disregards a substantial and unjustifiable risk of injury to others." *Commonwealth v. Jeter*, 937 A.2d 466, 468 (Pa. Super. Ct. 2007).

The Court does concur with Defendant's assessment of the law that for reckless driving, a driver under the influence of an intoxicating substance does not establish recklessness *per se*, and there needs to be other tangible indicia of unsafe driving to such a degree that the driver's conduct creates a

substantial risk of injury that is consciously disregarded. *See*, *Commonwealth v. Mastromatteo*, 719 A.2d 1081, 1083 (Pa. Super. Ct. 1998); *see also Greenberg*, 885 A.2d at 1027 (the *mens rea* necessary to support the offense of reckless driving is a requirement that driver operated his vehicle in such a manner that there existed a substantial risk that injury would result from his driving, that being, a high probability that a motor vehicle accident would result from driving in such a manner.)

This Court finds that the facts presented to it were parallel to the facts in *Jeter*, supra. In that case, the Superior Court upheld the trial court's finding that the defendant was guilty of reckless driving where: 1) eye witnesses observed the defendant weave his vehicle in and out of the roadway for several miles; 2) there were other drivers on the roadway at the time defendant was operating his vehicle at presumably a high rate of speed;[22] 3) defendant had a blood alcohol content of .021 within two hours of driving; and 4) defendant ultimately lost control of his car and struck the center barrier. *Id.* at 469.

In the case before the Court, there were eye witnesses, Dimovitz and Mosser, who may not have observed Defendant weave

[22] The Superior Court concluded that since the defendant was traveling on the Pennsylvania Turnpike, he was presumably traveling at an increased rate of speed, "which could have resulted in substantial harm to others if an accident had occurred." *Jeter*, 937 A.2d at 468.

in and out of traffic to the same extent as the defendant in *Jeter*, but did notice Defendant disregard the construction cones designed to partition the construction zone from the traffic lane proceeding on State Route 248, and thereafter travel into what was designed to be the prohibited right-hand lane. Once in the prohibited right-hand lane, Dimovitz saw Defendant travel at an accelerated rate of speed in an attempt to pass the line of traffic traveling in the proper left-hand lane, despite this area being an active construction work zone. Later, Mosser, who was further along State Route 248 then Defendant and Dimovitz, observed Defendant, and from his observations perceived the Defendant to be driving in such a manner that Mosser felt it was necessary from him to travel onto the shoulder of the road, close to the guide rail, in an attempt to avoid and prevent Defendant's vehicle from colliding with his. Additionally, Mosser stated that he himself was already driving greater than the speed limit and yet the Defendant was readily gaining ground upon him. Further, based on the testimony of these two eye witnesses, Defendant ultimately lost control of his vehicle and struck both Mosser's and Dimovitz's vehicles before colliding with the guide rail and the median separating the westbound lanes from the eastbound lanes.

Lastly, although there was no valid blood alcohol test result in this matter, Officer Cohowicz, based upon his

knowledge, experience, training, and observations of the defendant including Defendant's admission that he had consumed a beer not less than an hour ago, concluded that Defendant had been driving under the influence of alcohol.

The *Jeter* Court also quoted an earlier Superior Court opinion that reads: "there exists a level of intoxication that renders a person so incapable of safe driving that [the] probability of injury or death would rise high enough to satisfy the willful and wanton recklessness standard." *Id.* (quoting *Bullick*, 830 A.2d at 1004). Lastly, as stated in *Greenberg*, "one can drive at such an excessive speed, and in such a reckless manner, that one must be deemed aware of the fact that he is creating a substantial risk of causing a motor vehicle collision." *Greenberg*, 885 A.2d at 1028-29. In examining the totality of the circumstances, this Court found that the manner in which Defendant was operating his vehicle, and his consumption of alcohol not less than an hour prior to the accident, created such circumstances that Defendant had to be conscious of the substantial risk his driving caused or could cause to others.

Accordingly, upon viewing the evidence in the light most favorable to the Commonwealth, this Court respectfully recommends to the Superior Court that there was sufficient evidence to prove that the Defendant consciously disregarded the

probability that his driving could cause a substantial risk of harm to others on the roadway and thus Defendant is guilty of reckless driving.

*B. Weight of the Evidence*

Lastly, Defendant challenges the weight of the evidence present in this matter as it relates to the reckless driving conviction. In applying the standard set forth previous in this memorandum opinion, this Court finds Defendant's challenge to also be meritless.

As just stated, the Commonwealth presented three witnesses who were able to testify as to the manner of Defendant's driving prior to the accident, as well as Defendant's condition subsequent to the collision. Defendant offered, in response to the Commonwealth's evidence, the testimony of Ms. Everett, who was the passenger in Defendant's vehicle on the day in question. Ms. Everett testified that while in Defendant's car, but while on her cell phone, she observed Dimovitz race past them in such a manner as to shake Defendant's vehicle. Accordingly, not sure if Dimovitz might have clipped his vehicle, Defendant felt it was necessary to travel at such a high rate of speed in order to catch up to Dimovitz. Even if the Court were to accept Ms. Everett's testimony as true, which it did not,[23] such conduct by

[23] The determination of credibility of a witness is within the exclusive province of the jury. *Commonwealth v. Seese*, 517 A.2d 920, 923 (Pa. 1986).

the Defendant aids in satisfying the criteria for reckless driving.

## CONCLUSION

Based upon the foregoing, this Court respectfully asks that Defendant's issues raised on appeal be dismissed as either untimely, or as being fabricated from whole cloth and therefore meritless. Accordingly, this Court respectfully recommends that the verdict be allowed to stand and that this Court's Order dated October 21, 2013, imposing upon Defendant a period of incarceration in the Carbon County Correctional Facility of not less than forty-eight hours nor more than six months be affirmed.

**BY THE COURT:**

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**Joseph J. Matika, J.**