IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 17 CR 2019
	:	
VICTOR M. BRIDESON,	:	
Defendant	:	

Criminal Law – Driving Under the Influence of a Controlled Substance - Impaired Ability – Post-Sentence Motion for a New Trial - Weight of the Evidence - Admissibility of Refusing Requested Blood Test and Evaluation by Drug Recognition Expert - Consciousness of Guilt

1. To convict a motorist of driving under the influence of a controlled substance, impaired ability, in violation of 75 Pa.C.S.A. § 3802(d)(2), the Commonwealth must establish two necessary elements: (1) that the motorist was the operator of the vehicle; and (2) that the motorist's ability to operate was impaired by his use of a controlled substance to such a degree that he was incapable of safe driving.
2. In determining whether a jury's verdict is against the weight of the evidence such that a post-sentence motion for a new trial should be granted, the movant concedes that there is sufficient evidence to sustain the verdict, but contends that the evidence in support of the verdict is so tenuous, vague and uncertain that the verdict shocks the conscience of the court and/or that certain facts are so clearly of greater weight than others that for the jury to have ignored them or given them equal weight with the other evidence presented is to deny justice.
3. A motorist's refusal upon request to submit to an evaluation by a drug recognition expert and to provide a sample of his blood for chemical testing is evidence of consciousness of guilt admissible at trial on a charge of driving under the influence.
4. In reviewing a claim that a verdict is against the weight of the evidence and should be set aside, an appellate court reviews the exercise of discretion, not of the jury which rendered the verdict, but of the trial court which heard and saw the evidence presented and determined whether the verdict was so contrary to such evidence as to shock one's sense of justice.
5. The evidence in support of Defendant's conviction of driving under the influence of a controlled substance - that he was observed driving erratically for a distance of more than seven miles during which he forced multiple vehicles off the road, was disheveled and argumentative, exhibited multiple clues of intoxication when administered field sobriety tests, had constricted pupils - a sign of narcotic use, refused to be evaluated by a drug recognition expert or to submit a sample of blood for chemical testing, and where the results of a PBT evidenced no alcohol in Defendant's system - was not contrary to the weight of the evidence notwithstanding the absence of any controlled substance or paraphernalia found on Defendant's person or in his vehicle, no test

results evidencing the presence of a controlled substance in Defendant's system, and Defendant's explanation that his erratic driving and performance when field tested was the result of extreme fatigue and that the appearance of his pupils was the result of a head injury he sustained when he was a child.

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Michael S. Greek, Esquire — Counsel for Commonwealth
Matthew J. Mottola, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – June 2, 2020

On June 4, 2019, a jury found Victor M. Brideson ("Defendant") guilty of driving under the influence of a controlled substance – impaired ability.[1] Defendant challenges this conviction in a post-sentence motion now before us. In his motion, Defendant requests this Court to vacate the judgment of sentence and grant a new trial. Following a review of the record, and careful consideration, we deny Defendant's requests.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of August 16, 2018, Defendant was stopped in the parking lot of Ametek, Inc. ("Ametek") by Officer Richard Neikam ("Neikam") of the Nesquehoning Police Department for erratic driving. (Notes of Transcript (N.T.), 6/4/2019, p. 37). Neikam was first alerted to Defendant's erratic driving through a dispatch from the Carbon County Communications Center. (N.T., p. 33). Jennifer Dempsey ("Dempsey"), an off-duty officer with the Mahanoy City Police Department, earlier witnessed Defendant driving erratically

[1] 75 Pa.C.S.A. § 3802(d)(2).

and reported his vehicle registration and make and model of the vehicle in question to the "Comm. Center." (N.T., pp. 98-102). Dempsey then continued to follow Defendant's vehicle until Neikam's arrival, at which point Dempsey followed both Defendant's vehicle and Neikam into the Ametek parking lot. (N.T., pp.103-05).

Dempsey had followed behind Defendant from the Dunkin Donuts in Lehighton, through Jim Thorpe, and to Ametek in Nesquehoning, a distance of approximately 7.5 miles. (N.T., p. 99). At trial, Dempsey described what she observed as she was driving behind Defendant. She described how Defendant drove at widely varying speeds- stretches of very slow speeds and then stretches of very high speeds, multiple incidences of Defendant's vehicle crossing both the fog line and double yellow line, as well as a number of near accidents caused by the Defendant's erratic driving. (N.T., pp. 101-03). Dempsey testified that she observed at least three incidences where Defendant's vehicle nearly collided with vehicles in the opposite lane, causing those vehicles to cross over the fog lines in their lane of traffic to avoid hitting Defendant. (N.T., p. 102). After responding to the dispatch, Neikam followed Defendant for approximately two-tenths of a mile, during which time he also observed erratic driving of the same type described by Dempsey, causing him to stop Defendant after Defendant turned into the Ametek parking lot. (N.T., pp. 34-36).

After activating his overhead lights, Neikham approached Defendant's vehicle and spoke with Defendant. (N.T., p. 37). Neikham reported that Defendant appeared disheveled, had constricted pupils, and described Defendant's behavior as being upset and argumentative. (N.T., pp. 37-39). The appearance of Defendant, his behavior, and his constricted pupils led Neikham to believe that Defendant may have been under the

influence of an illegal substance. (N.T., p. 38). Neikham then had Defendant perform two separate field sobriety tests, the walk-and-turn and one-legged stand tests. (N.T., pp. 40-46). During the walk-and-turn test, Defendant took the wrong number of steps, missed heel to toe placement on several occasions, and did not count out his steps aloud as instructed. (N.T., pp. 43-44). Defendant also failed to keep his arms lowered at his side during this test, indicating a loss of balance. (N.T., pp. 44-45). During the one-legged stand test, Defendant again failed to keep his arms at his side as instructed, swayed and hopped around, and could not keep his foot off the ground. (N.T., p. 46). Following Defendant's performance of these tests, Neikham placed Defendant under arrest for suspicion of driving under the influence of a controlled substance and other charges, and transported him to the police station. (N.T., pp. 46, 49). At the police station, Defendant agreed to a portable breath test (PBT), which indicated the absence of alcohol. (N.T., p. 50).

Neikham requested a Drug Recognition Expert (DRE) to assess whether Defendant was under the influence of a controlled substance. (N.T., pp. 48-49). Pennsylvania State Trooper Michael Sofranko ("Sofranko") was the DRE who responded to conduct this evaluation. (N.T., p 79). After meeting with Defendant and explaining that the evaluation was voluntary, Defendant refused to consent to the examination. (N.T., p. 79). Defendant also refused to consent to a blood draw. (N.T., p. 51). Sofranko testified that, even though his interaction with Defendant was brief, he did witness that Defendant's eyes were bloodshot and glassy, and his pupils constricted. (N.T., p. 79). Additionally, Sofranko testified to his qualifications, and the Court recognized him as a drug recognition

expert. (N.T., pp. 68-74). As an expert witness, Sofranko testified that constriction of the pupils is indicative of controlled substance use. (N.T., pp. 80-81).

A jury trial was held on June 4, 2019, wherein the Commonwealth established the previously laid-out facts. Defendant testified in his defense that his impairment on the night in question was the result of personal difficulties he was having at the time and not due to a controlled substance. Defendant testified that a few days before the incident he was evicted from his apartment and had become homeless. (N.T., p. 121). Additionally, he was working as a temporary employee at Ametek, Inc. and was trying to turn that employment into a permanent position.[2] (N.T., p. 123). At the time, Defendant was living in his van, and his girlfriend, Terry Stettler ("Stettler"), who had previously resided with him prior to being evicted, had been living with a friend. (N.T., p. 158). Defendant testified that because of his homelessness, his concern for Stettler, and his need to turn his temporary employment into permanent employment, he had not slept for three days prior to the incident. (N.T., p. 126). Furthermore, Defendant testified to a problem with his eyes. He explained that he was born cross-eyed, and that as a child he was hit by a car, causing damage to his eye. (N.T., p. 128). Defendant described this damage as amounting to a "lazy eye, moving back and forth." (N.T., pp. 128-29).

Defendant further testified that his crossing the center line while driving and nearly striking several vehicles was done intentionally to alert the vehicle behind him (i.e., Dempsey) that she was driving too close. (N.T., pp. 139-42). He claimed that he was

[2] The traffic stop occurred in the Ametek plant parking lot as Defendant was reporting for his scheduled 11:00 P.M. – 7:00 A.M. shift. (N.T., pp. 123-24). Defendant testified that during his interaction with Neikham, he explained to the officer that he was an Ametek employee and that he "hadn't slept," and was "just tired." (N.T., p. 128).

trying to “move the vehicle so that the lights would hit my mirror and would reflect back on the vehicle behind me letting them know to back off; you're too close.” (N.T., p. 139). Defendant claimed to have learned this strategy from his high school driving instructor. (N.T., p. 139). Moreover, Defendant testified that his bouts of slow driving were due to cautious observation for construction zones and fear of deer and other wildlife crossing the road. (N.T., pp. 143-44).

Defendant claimed his impairment on the night of the incident was due to his stress and lack of sleep, as well as being cross-eyed, and not due to a controlled substance. In addition, Stettler testified that she had spent the day of the incident with Defendant and had not seen Defendant take any drug or controlled substance, but did notice that Defendant was stressed and tired, and even suggested that Defendant not go into work that night. (N.T., pp. 160-61).

Following deliberation, on June 4, 2019, the jury found Defendant guilty of 75 Pa.C.S.A. § 3802(d)(2), driving under the influence of a controlled substance - impaired ability.[3] On January 17, 2020 Defendant was sentenced to incarceration for a period of not less than six months nor more than five years. On January 24, 2020 Defendant timely filed his Post-Sentence motion, arguing that the jury’s verdict was against the weight of the evidence.

DISCUSSION

In a jury trial, the weight of the evidence is exclusively for the jury, who is “free to believe all, part, or none of the evidence and to determine the credibility of the witnesses.”

[3] This court additionally found Defendant guilty of the following summary offenses: careless driving (75 Pa.C.S.A.§ 3714(a)), failure to keep right (75 Pa.C.S.A. § 3301(a)), and disregarding traffic lanes (75 Pa.C.S.A. § 3309(1)).

Commonwealth v. McCloskey, 835 A.2d 801, 809 (Pa.Super. 2003). "A motion for new trial on grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to support the verdict, but contends, nevertheless, that the verdict is against the weight of the evidence." Commonwealth v. Davis, 799 A.2d 860, 865 (Pa.Super. 2002). Whether a new trial should be granted on grounds that it is against the weight of the evidence is addressed to the sound discretion of the trial court. Id. In determining whether the verdict is against the weight of the evidence, the role of the trial court is to determine whether "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." Commonwealth v. Widmer, 744 A.2d 745, 752 (Pa. 2000). A jury's verdict should not be disturbed unless it is so contrary to the evidence as to shock one's sense of justice. Commonwealth v. Miller, 724 A.2d 895, 901 (Pa. 1999).

Defendant was convicted under 75 Pa.C.S.A. § 3802(d)(2), driving under the influence of a controlled substance – impaired ability. Subsection 3802(d) states:

> (d) An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
> * * *
> (2) The individual is under the influence of a drug or combination of drugs to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle.

75 Pa. C.S.A. § 3802(d)(2).

This subsection has two necessary elements: (1) the defendant was the operator of the vehicle; and (2) the defendant's ability was impaired due to consumption of a controlled substance to such a degree that he was incapable of safe driving. Commonwealth v. Griffith, 32 A.3d. 1231, 1239 (Pa. 2011) (analogizing the necessary

elements of section 3802(d)(2) to that of section 3802(a)(1)). Here, Defendant concedes that the Commonwealth presented sufficient evidence to sustain its burden of proof. See Davis, 799 A.2d at 865; see also Widmer, 744 A.2d at 751 (stating the test for a claim challenging the sufficiency of the evidence). Instead, Defendant argues that the verdict is against the weight of the totality of the evidence presented to the jury.

The Commonwealth introduced evidence that Defendant was observed driving erratically for an extended period of time. Dempsey testified that she witnessed Defendant alternating between periods of excessively slow and high driving speeds, multiple times where Defendant's vehicle crossed both the fog line and double yellow line, and multiple times where Defendant's driving nearly caused an accident with on-coming traffic. Dempsey testified that she witnessed the extent of Defendant's erratic driving over a distance of roughly seven (7) miles, prompting her to contact the "Comm. Center" for fear Defendant would cause an accident. Neikam testified that he witnessed Defendant exhibit similar signs of erratic driving after responding to the dispatch of Dempsey's report.

Further, the Commonwealth presented evidence that after commencing a traffic stop upon Defendant, Neikam observed Defendant appearing disheveled, argumentative, and exhibiting constricted pupils. These signs, coupled with Defendant's erratic driving, prompted Neikam to suspect that Defendant was operating his vehicle under the influence of a controlled substance. At Neikam's direction, Defendant performed two field sobriety tests, the walk-and-turn and the one-legged stand tests, both of which evidenced signs of intoxication. The totality of the circumstances led Neikam to place Defendant under arrest for suspicion of driving under the influence.

The Commonwealth moreover presented evidence that Defendant refused to submit to a DRE assessment and a blood test. See 75 Pa.C.S.A. § 1547(e) ("[T]he fact that the defendant refused to submit to chemical testing . . . may be introduced in evidence along with other testimony concerning the circumstances of the refusal . . .."); Commonwealth v. Ruttle, 565 A.2d 477, 480 (Pa.Super. 1989). Such evidence of a driver's refusal to submit to a blood test is evidence of consciousness of guilt admissible at trial on a charge of driving under the influence. Commonwealth v. Bell, 211 A.3d 761, 773-76 (Pa. 2019). Additionally, Sofranko, testifying as an expert witness, opined that Defendant's constricted pupils, a condition he observed, were an indicator for the use of a controlled substance. Finally, the PBT test revealed that no alcohol was present in Defendant's system.

The above evidence reasonably and logically supports Defendant's guilty verdict for driving under the influence of a controlled substance – impaired ability. The evidence Defendant presented at trial, and on which he now relies, was not so overwhelmingly supportive of Defendant's innocence as to cast doubt on whether justice was served. See Commonwealth v. Mikitiuk, 213 A.3d 290, 305 (Pa.Super. 2019) (holding that to prevail on a challenge to the weight of the evidence, the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court). See also Commonwealth v. Williamson, 962 A.2d 1200, 1204 (Pa.Super. 2008) (holding that the Commonwealth need not establish that any particular amount of a controlled substance was in the defendant's blood); Commonwealth v. DiPanfilo, 993 A.2d 1262, 1268 (Pa.Super. 2010) (holding that the Commonwealth need not establish impairment through a blood test).

Defendant's defense was based primarily on self-serving testimony, which the jury was entitled to discredit in its entirety. It is within the province of the jury to determine the credibility of the witnesses and the weight of the evidence presented. McCloskey, 835 A.2d at 809. Nor would it be appropriate for us to reassess the credibility determinations of the jury and usurp this function of the jury.

The jury in the current case, in weighing the evidence presented at trial, clearly found the Commonwealth's evidence more credible than Defendant's. We do not find fault in this exercise of discretion or find that a serious miscarriage of justice has occurred. See Commonwealth v. Brown, 648 A.2d 1177, 1189-92 (Pa. 1994) (explaining the standard for finding a verdict is against the weight of the evidence). As it is wholly within the determination of the jury how to consider and weigh the evidence, only in extraordinary circumstances will that determination be questioned. Cf. Widmer, 744 A.2d at 754 (holding a trial court's grant of a new trial based on "nothing more than its assessment of the credibility of the witnesses" improper). In the current case, the evidence accepted by the jury reasonably and legitimately supports a finding of guilt, and the evidence it rejected is not so clearly of greater or equal weight such that the verdict shocks the conscience of the court or resulted in a serious miscarriage of justice. Simply stated, we do not find that the preponderance of the evidence opposes the verdict.

CONCLUSION

Defendant's claim that the jury's verdict was against the weight of evidence is without merit. The evidence presented supporting the jury finding Defendant guilty of driving under the influence – impaired ability, when weighed against all the evidence

presented in this case, does not shock the conscience of this Court or require the award of a new trial for justice to prevail. Therefore, Defendant is denied the relief sought.

BY THE COURT:

_____
Roger N. Nanovic, P.J.