

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL LAW

COMMONWEALTH OF PENNSYLVANIA :
 :
 vs. : NO: 272 CR 2011
 :
 KEITH NORBIN MCINAW, :
 Defendant :

 Michael S. Greek, Esquire Counsel for Commonwealth
 Eric J. Conrad, Esquire Counsel for Defendant

Nanovic, P.J. - December 30, 2011

MEMORANDUM OPINION

The Defendant, Keith Norbin McInaw, has been charged with Driving under the Influence, Feeing or Attempting to Elude Police Officer, and multiple traffic offenses. Defendant has filed a Petition for Writ of Habeas Corpus regarding the DUI Offense. The Court now looks to examine the sufficiency of the evidence for this charge.

FACTUAL AND PROCEDURAL HISTORY

On or about August 17, 2010, Defendant, Keith Norbin McInaw, was arrested and charged with DUI,¹ Feeing or Attempting to Elude Police Officer,² and multiple traffic offenses. The charges stem from an incident which occurred on Spruce Hollow

¹ 75 Pa.C.S.A. §3802(A) (1)

² 75 Pa.C.S.A. §3733(A)

Road in Towamensing Township, Carbon County. Trooper Anthony Doblovasky witnessed multiple traffic violations while following Defendant.

The trooper began following Defendant after seeing him fail to stop at a marked stop sign. The road on which the incident took place is a road with multiple curves and bends. Trooper Doblovasky alleged as well that the Defendant was travelling at a high rate of speed throughout the encounter. The trooper also alleges that he activated his lights and siren in a manner that should have alerted the Defendant to his presence; however, Defendant continued to drive until he was involved in an accident while navigating a turn. The Defendant first alleged that he lost control while navigating the turn, but later added that he was also avoiding a deer in the road.

Trooper Doblovasky further testified that he smelled an odor of alcohol on the Defendant. No field sobriety tests were performed on scene. The Defendant was then taken to the hospital. At the hospital, blood was drawn from the Defendant within the required two hour time frame, and his blood alcohol content was found to be .05.³ Defendant admits to drinking on the night of the incident; however, he claims that he did not have much to drink.

³ This reading is below the legal limit of .08 laid out by 75 Pa.C.S.A. §3802(A)(2).

The preliminary hearing was held on April 15, 2011, before Magisterial District Judge Appleton. Multiple charges were bound over to the Court of Common Pleas.

Of the numerous charges which were bound over, Defendant challenges only the sufficiency of the evidence in regard to the DUI charge. Therefore, we have reviewed the record to determine if there was sufficient evidence supporting this charge.

DISCUSSION

Defendant seeks to have the charges against him dismissed for lack of sufficient evidence presented at the preliminary hearing.

The principle function of a preliminary hearing is to protect the individual against unlawful detention. The prosecution, therefore, has the burden of establishing "at least *prima facie* that a crime has been committed [a]nd the accused is the one who committed it... The prosecution must establish "sufficient probable cause" that the accused has committed the offense.

Commonwealth v. Prado, 393 A.2d 8, 10 (Pa. 1978) (citations omitted). Further,

[t]he Commonwealth establishes a *prima facie* case when it produces evidence that, if accepted as true, would warrant the trial judge to allow the case to go to a jury. [T]he Commonwealth need not prove the elements of the crime beyond a reasonable doubt; rather, the *prima facie* standard requires evidence of the existence of each and every element of the crime

charged. Moreover, the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense. Inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case.

Commonwealth v. Marti, 779 A.2d 1177, 1180 (Pa.Super. 2001)

(citations and quotation marks omitted).

In our consideration of whether the charges should be dismissed we look only to see whether the Commonwealth was able to establish a *prima facie* case against the Defendant. In making this decision, all evidence must be viewed in favor of the Commonwealth.

The Vehicle Code at 75 Pa.C.S.A. §3802(a)(1) states that "[a]n individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle."

Defendant claims that there was insufficient evidence to show general impairment under this statute due to a lack of field sobriety test results, and a blood alcohol content of only .05. In proving general impairment, the Commonwealth may rely on physical characteristics in order to sustain a charge of

general impairment. See Commonwealth v. Hunsinger, 549 A.2d 973 (1988); see also Commonwealth v. Feathers, 660 a.2d 90, 95 (Pa.Super. 1995). In Commonwealth v. Griscavage, 517 A.2d 1256, 1259 (Pa. 1986), the Court held that the Commonwealth can sustain its burden to prove impairment from a factual pattern such as excessive speeding and crossing the center line of the road. Griscavage went on the hold that a blood alcohol content level below the numerical limit set by the Legislation, when paired with factual evidence of impairment, could lead the trier of fact to find that the vehicle operator was under the influence.⁴

Further an admission to consuming alcohol or alcohol on the breath, absent other indicia of intoxication, is not sufficient to sustain a conviction for driving under the influence. See Commonwealth v. Stosny, 31 A.2d 582, 584 (Pa.Super. 1943). There must be visible physical effects of intoxication; "conjecture cannot take the place of proof." *Id.*

However, impairment is not defined by a particular blood alcohol level but based on the inability of an individual to drive safely. See Commonwealth v. Segida, 985 A.2d 871, 878 (Pa. 2009). Courts have also found violations of 75 Pa.C.S.A.

⁴ It must be noted that while counsel refer to .10 as the legal limit for blood alcohol content in the brief, this is no longer the law. It is true that several of the previously cited cases reference .10 as the limit applicable at the time; however, the current BAC limit is .08 under 75 Pa.C.S.A. § 3802(A)(2).

3802(A)(1) due to traffic violations, odor of alcohol, and unsafe driving practices. See Commonwealth v. Kerry, 906 A.2d 1237 (Pa.Super. 2006); see Commonwealth v. Gruff, 822 A.2d 773, 781 (Pa. Super 2003). Nor does impairment require an extreme disability, rather there must only be incapacity to drive safely. See Commonwealth v. Gruff, 822 A.2d 773, 781 (Pa.Super. 2003). The fact that a defendant shows some discretion while driving does not negate the ability of the Commonwealth to prove general impairment. See *id.*

It is true that no field sobriety tests were performed on the Defendant at the scene of the accident. While such on scene testing would have been helpful for disposition of this matter, according to the above legal analysis, it does not preclude a finding that Defendant was impaired while driving. While the odor of alcohol and Defendant's admission that he did have some alcohol do not conclusively show that Defendant was impaired, there are other factors to consider. Defendant was driving erratically, committing multiple traffic offenses, and tried to elude a police officer. The Defendant ultimately crashed his motorcycle while trying to negotiate a turn. This, paired with Defendant's admission that he was drinking alcohol, lends credence to the Commonwealth's charge.

Although the Defendant had a BAC within the legal

limit, 75 Pa.C.S.A. 3208 (A)(1) is a provision prohibiting driving while impaired, regardless of the driver's BAC. From the circumstances at hand, including multiple traffic violations, evading a police officer, alcohol on the breath, and an accident, the Commonwealth has made a case for impairment beyond mere conjecture. Therefore, we find that the Commonwealth has presented sufficient evidence in support of a *prima facie* case for Driving Under the Influence.

CONCLUSION

In accordance with the foregoing, Defendant's Petition for Writ of Habeas Corpus is denied.

BY THE COURT:

P.J.