

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

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : NO. 1665-CR-2016
 :
 TAMATHA STORM, :
 :
 Defendant :
 :

Michael S. Greek, Esquire Counsel for the Commonwealth
First Asst. District Attorney

Matthew J. Mottola, Esquire Counsel for the Defendant
Asst. Public Defender

MEMORANDUM OPINION

Serfass, J. - June 27, 2017

On December 29, 2016, Defendant, Tamatha Storm, (hereinafter "Defendant") was arrested by the Pennsylvania State Police and charged with the following offenses:

1. DUI: General Impairment/Incapable of Driving Safely - 2nd Offense, 75 Pa.C.S.A. §3802 §§A1;
2. DUI: Highest Rate of Alcohol (BAC .16+) - 2nd Offense, 75 Pa.C.S.A. §3802 §§C;
3. Endangering Welfare of Children - Parent/Guardian/Other Commits Offense, 18 Pa.C.S.A. §4304 §§A1;
4. Endangering Welfare of Children - Parent/Guardian/Other Commits Offense, 18 Pa.C.S.A. §4304 §§A1;
5. Endangering Welfare of Children - Parent/Guardian/Other Commits Offense, 18 Pa.C.S.A. §4304 §§A1; and

6. Endangering Welfare of Children - Parent/Guardian/Other
Commits Offense, 18 Pa.C.S.A. §4304 §§A1.

Defendant filed a "Omnibus Pre-Trial Motion" on December 29, 2016, averring that the Commonwealth failed to produce sufficient evidence to establish a *prima facie* case against her for each of these charges. For the reasons set forth hereinafter, Defendant's motion will be granted.

FACTUAL AND PROCEDURAL HISTORY

On April 17, 2016, Defendant, along with her four young children, attended a backyard cookout at her father's residence located at 220 White Street, Weissport, Carbon County, Pennsylvania. Upon her arrival, Defendant parked her vehicle in the alleyway behind her father's residence. At some point, she left the cookout and purchased a bottle of vodka at a local liquor store. After returning to the cookout, Defendant began to drink the bottle of vodka. During the course of the day, Defendant and her father's girlfriend became engaged in an argument. At approximately 8:00 p.m., Defendant's father left the cookout to aid a friend. Before leaving, he recommended that Defendant wait in her vehicle until he returned home to prevent any further escalation of her argument with his girlfriend. At approximately 9:00 p.m., Trooper Ronald Mercatili of the Pennsylvania State Police received a report that a female was passed out at the wheel of her vehicle which was parked in the alley behind the 220 White

Street residence. As Trooper Mercatilli approached the Defendant's vehicle, she appeared to be slumped over the steering wheel. Upon initial contact with Defendant, the Trooper found her to be awake and sitting in the driver's seat of her vehicle, with the engine running. Trooper Mercatilli smelled alcohol emanating from the vehicle. While speaking with Defendant, the trooper noted that her speech was slurred and that she had glassy, bloodshot eyes. He then had Defendant exit the vehicle and perform several field sobriety tests. While Defendant performed these tests, Trooper Mercatilli noticed several signs of impairment. Defendant was arrested for suspicion of DUI and was transported to Gnaden Huetten Memorial Hospital where she consented to a blood draw.

Defendant was subsequently charged with the six criminal offenses listed hereinabove. Magisterial District Judge Eric M. Schrantz bound over all charges at a preliminary hearing held on December 14, 2016.

On December 29, 2016, Defendant filed the instant Omnibus Pre-Trial Motion which includes a suppression motion and a habeas corpus petition. A hearing on the omnibus motion was held before this Court on March 20, 2017. At that hearing, the Commonwealth conceded that Defendant's blood draw was coerced pursuant to the Fourth Amendment of the United States Constitution as interpreted by the United States Supreme Court decision in Birchfield v. North Dakota, -- U.S. --, 136 S.Ct. 2160 (2016). On the date of the

hearing, this Court issued an order suppressing the results of Defendant's blood draw. We are therefore presented with one overarching issue based upon the habeas corpus petition contained within Defendant's Omnibus Pre-Trial Motion: whether the Commonwealth produced sufficient evidence at the preliminary hearing to establish a *prima facie* case against Defendant for each charge filed against her.

DISCUSSION

For this Court to conclude that the Commonwealth met its burden of proof at the preliminary hearing, we must find sufficient probable cause to believe that Defendant committed the offenses charged; it is not necessary that the Commonwealth prove Defendant's guilt beyond a reasonable doubt. Commonwealth ex rel. Scolio v. Hess, 27 A.2d 705, 707 (Pa. Super. 1942). The Commonwealth's burden at a preliminary hearing is to establish at least *prima facie* evidence that a crime has been committed and that the accused is the one who committed it. Commonwealth v. Mullen, 333 A.2d 755 (Pa. Super. 1975).

I. Operation of Vehicle While Intoxicated

The facts of the case at bar are not unique with regard to the DUI offense. Many cases have addressed whether an intoxicated individual, sitting in the driver's seat of a parked but running vehicle, is a sufficient basis to support a DUI conviction. The

crux of such decisions turns on whether the accused operated or had actual physical control over his vehicle within the scope of 75 Pa.C.S.A. §3802(a)(1) and (c). In addressing what constitutes "actual physical control" of a motor vehicle within the meaning of the DUI statutes, we must consider the totality of the circumstances. Commonwealth v. Williams, 871 A.2d 254, 259 (Pa.Super. 2003). Specifically, we must consider whether the engine was running, the location of the vehicle, and whether there was additional evidence indicating that the defendant had driven the vehicle prior to the arrival of the police. Commonwealth v. Woodruff, 668 A.2d 1158, 1161 (Pa. Super. 1995) citing Commonwealth v. Byers, 650 A.2d 468, 469 (Pa.Super. 1994).

Initially, we note that the engine of Defendant's vehicle was running when Trooper Mercatili arrived in Weissport. However, this factor alone is insufficient to establish that Defendant had actual physical control of the movement of her vehicle. Commonwealth v. Byers, 650 A.2d 468 (Pa.Super. 1994). (A defendant who was found sleeping in the driver's seat of a parked car with the engine running at 3:00 a.m. was found to not have actual physical control over his vehicle because he had not moved the car from the parking lot where he had been drinking). Rather, the courts of this Commonwealth have placed greater emphasis on the second and third factors.

The location of Defendant's vehicle is crucial to this analysis because there must be evidence which indicates that the accused operated or had actual physical control of the vehicle while under the influence of alcohol. Commonwealth v. Saunders, 691 A.2d 946, 949 (Pa. Super. 1997). A common method of establishing the same is to show that the vehicle is parked in a location where the accused could not access alcohol. If, for example, a defendant was found in the parking lot of a business that does not serve alcohol, sitting in the driver's seat, while the engine was running, then, based on this circumstantial evidence, one can reasonably infer that the accused drove to the parking lot while intoxicated. Commonwealth v. Williams, 871 A.2d 254 (Pa. Super. 2005).¹

Conversely, in the case at bar, there is no evidence to suggest that Defendant moved her vehicle after starting the engine. Similar to the accused in Byers, Defendant was found in the same location where she had parked her vehicle earlier that day. There is no evidence indicating that she drove her vehicle to the cookout while intoxicated or had moved her vehicle after drinking at the cookout. Absent any such evidence, we cannot find that Defendant

¹ As Defendant aptly highlights, there are a litany of cases to support the proposition that in order to find the accused asserted actual physical control over a vehicle, there must be at least circumstantial evidence which proves that the defendant drove the vehicle while intoxicated. See Commonwealth v. Brotherson, 888 A.2d 901, 905 (Pa. Super. 2005); Commonwealth v. Byers, 650 A.2d 468 (Pa. Super. 1994); Commonwealth v. Lehman, 820 A.2d 766 (Pa. Super. 2003); Commonwealth v. Woodruff, 668 A.2d 1158, 1161 (Pa. Super. 1995); and Commonwealth v. Yaninas, 722 A.2d 187, 189 (Pa. Super. 1998).

operated or exercised actual physical control over her vehicle in violation of 75 Pa.C.S.A. §3802(a) or 75 Pa.C.S.A. §3802(c). Therefore, counts one (1) and two (2) of the information relating to DUI must be dismissed.

II. Endangering the Welfare of Children

Defendant is also charged with four counts of endangering the welfare of a child based upon the fact that, while intoxicated, she gathered her four children - ages 10, 6, 2 and 1 - into her vehicle and sat in the vehicle with them while the engine was running. The endangering the welfare of a child statute criminalizes "[a] parent, guardian or other person supervising the welfare of a child by violating a duty of care, protection or support". 18 Pa. C.S.A. §4304(a)(1).

The first step in determining whether the accused placed her children in danger is to identify the danger which jeopardized their physical and/or psychological welfare. In Commonwealth v. Retkofsky, 860 A.2d 1098, 1099 (Pa.Super. 2004), the Pennsylvania Superior Court determined that a father who fled from police on an all-terrain vehicle with his unrestrained son on the back of the ATV, knowingly endangered his son's welfare. Similarly, in Commonwealth v. Winger, 957 A.2d 325 (Pa.Super. 2008), a mother who operated a vehicle while intoxicated with her son in the backseat endangered the child's welfare because she knew that she

was intoxicated when she decided to drive her vehicle while her son was a passenger.

We recognize that 18 Pa. C.S.A. §4304(a)(1) is a broad statute which covers a broad range of conduct in order to safeguard the welfare and security of children. Retkofsky, 860 A.2d at 1099. Endangering the welfare of a child is a specific intent crime that requires the Commonwealth to establish that a defendant knowingly violated his duty of care. Commonwealth v. Fester, 764 A.2d 1076 (Pa. Super. 2000). In this regard, Pennsylvania courts have adopted the following three-part test:

1) the accused must be aware of his or her duty to protect the child; 2) the accused must be aware that the child is in circumstances that could threaten the child's physical or psychological welfare; and 3) the accused either must have failed to act or must have taken action so lame or meager that such actions cannot reasonably be expected to be effective to protect the child's welfare. Id.

Here, there is no dispute as to the first part of the test. Clearly as their mother, Defendant had a duty to protect her four young children. With regard to the second part of the test, Defendant claims she was unaware that her conduct threatened the children's welfare or placed them at risk of harm. However, Defendant knew she was intoxicated when she gathered up her children, placed them in the rear seat of her vehicle, started the engine and slumped over the steering wheel. The issue here is not whether the children's safety was actually harmed but whether

Defendant exposed the children to the risk of harm. See Commonwealth v. Mastromatteo, 719 A.2d 1081 (Pa. Super. 1998). We find that Defendant's actions exposed the children to a substantial risk of harm which was readily apparent. Clearly, in her intoxicated state, she was in no position to care for or protect her children. Finally, having drunk vodka at her father's cookout to the point of intoxication, placing her four young children in her vehicle and then starting the engine, we are unaware of any efforts undertaken by Defendant to protect her children's welfare.

As Defendant's counsel has noted in his brief, the Pennsylvania Supreme Court has stated that "[t]he common sense of the community, as well as the sense of decency, propriety and morality which most people entertain is sufficient to apply the status to each particular case, and to individuate what particular conduct is rendered criminal by it." Commonwealth v. Mack, 359 A.2d 770, 772 (Pa. 1976). Applying this standard to the facts of this case, we hold that placing one's four minor children, ages 1 through 10, into a vehicle with an intoxicated parent and a running engine with no other adult present, exposes the children to a risk of harm and constitutes a violation of that parent's duty of care and protection, thereby endangering the welfare of those children.

CONCLUSION

For the foregoing reasons, Defendant's Petition for Writ of Habeas Corpus will be granted in part and denied in part, and we will enter the following

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

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : NO. 1665-CR-2016
 :
 TAMATHA STORM, :
 :
 Defendant :

Michael S. Greek, Esquire Counsel for the Commonwealth
First Asst. District Attorney

Matthew J. Mottola, Esquire Counsel for the Defendant
Asst. Public Defender

ORDER OF COURT

AND NOW, to wit, this 27th day of June, 2017, upon consideration of Defendant's "Omnibus Pre-Trial Motion", containing both a suppression motion and a petition for writ of habeas corpus, and the brief in support thereof¹, and the Court having granted the suppression motion via Order dated March 20, 2017, and for the reasons set forth in our Memorandum Opinion bearing even date herewith, it is hereby

ORDERED and DECREED that Defendant's Petition for Writ of Habeas Corpus is GRANTED in part and DENIED in part, as follows:

1. Defendant's petition is granted as to Count one (1), Driving Under the Influence - general impairment (75 Pa.C.S.A. §3802(a)(1)) and Count two (2), Driving Under the Influence -

¹ The Commonwealth did not file a brief in opposition to Defendant's motion.

highest rate of alcohol (BAC .16+) (75 Pa.C.S.A. §3802(c) and said counts are hereby dismissed; and

2. Defendant's petition is denied as to Counts three (3) though six (6), Endangering the Welfare of a Child (18 Pa.C.S.A. §4304(a)(1)).

BY THE COURT:

A handwritten signature in black ink, appearing to read 'S. R. Serfass', written over a horizontal line.

Steven R. Serfass, J.

FILED
JUL 27 PM 1:03
CLERK OF COURT
JUL 27 2017