

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 98-11,651  
:   
vs. :   
:   
:   
MARK McCULLEY, :   
Defendant : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN  
COMPLIANCE WITH RULE 1925(a) OF  
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this Court's Order of December 3, 1999, which denied the defendant's Post Sentence Motions.

In June 1998, Lycoming County parole officers were trying to get in contact with the defendant regarding his supervision. Shortly after 5:00 p.m. on June 18, 1998, parole officer Scott Metzger received a phone call that the defendant was in the area of 400 Lycoming Street in the city of Williamsport. Mr. Metzger and another parole officer, David Frederick proceeded to that area and observed the defendant in a 1978 blue pickup truck. Mr. Metzger blocked the defendant's vehicle with his vehicle, then he and Mr. Frederick approached the defendant. Mr. Frederick turned off the vehicle's ignition and one of the parole officers requested that the defendant exit the vehicle. The defendant complied with this request. An odor of alcohol emanated from the defendant and he had glassy eyes and slurred speech.

Officer William Lynn arrived on the scene at 5:23 p.m. Officer Lynn asked the defendant to perform field sobriety tests. The defendant attempted four such tests and failed them. Officer Lynn took the defendant into custody and transported him to the Williamsport Hospital for a blood test. The results indicated the defendant had a blood alcohol content (BAC) of .11%. The

defendant was charged with driving under the influence of alcohol (DUI), incapable of safe driving; DUI, .10 or greater; and driving under suspension, DUI related.

A jury trial was held June 22, 1999. The jury found defendant guilty of both counts of DUI and the Court found defendant guilty of driving under suspension, DUI related. On or about August 25, 1999, the Court sentenced the defendant.

On September 7, 1999, the defendant filed Post Sentence Motions in which he asserted the verdict was insufficient to sustain his conviction for DUI .10 or greater in the absence of expert testimony to relate his BAC back to the time he was driving and the Court erred by instructing the jury on prima facie evidence of .10% or greater in accordance with 75 Pa.C.S.A. §3731(a.1). The Court denied the defendant's Post Sentence Motions in its Order of December 3, 1999.

On December 9, 1999, the defendant filed the instant appeal. In his appeal the defendant asserts: (1) in order to sustain his conviction for DUI .10 or greater, the Commonwealth had to present expert testimony; and (2) 75 Pa.C.S.A. §3731(as.1) is unconstitutional and therefore, the Court erred in giving the jury a prima facie instruction in accordance therewith,

On both these, issues, the Court relies on its Order of December 3, 1999. In addition, the Court notes the Pennsylvania Superior Court en banc found 75 Pa.C.S.A. §3731(a.1) constitutional in Commonwealth v. Murray, 749 A.2d 513 (Pa.Super. 2000).

DATE: \_\_\_\_\_

By The Court,

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Kenneth D. Brown, J.