

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 99-11.356  
:   
vs. : CRIMINAL DIVISION  
:   
DIANE YEARICKS, :   
Defendant : Motion to Dismiss

**ORDER**

AND NOW, this \_\_\_\_ day of March 2000, the Court GRANTS the defendant's Motion to Dismiss. The Court finds that this case is controlled by the Pennsylvania Superior Court decision in Commonwealth v. Byers, 650 A.2d 468 (Pa.Super. 1994), and the evidence presented is insufficient to show the defendant drove, operated or was in actual physical control of the movement of a motor vehicle. There was no evidence that the vehicle was moved in the bar parking lot subsequent to the defendant's consumption of alcohol. Furthermore, the defendant testified she got in the vehicle, started it and turned on the lights so she could move any objects on the seat out of view and see what was going on around her. Then she planned on locking the vehicle and giving the keys to the bartender; however, she fell asleep with the engine running.

The Court notes that the Pennsylvania Supreme Court, in a plurality decision, criticized the portion of Byers which considered the defendant's threat to public safety. Commonwealth v. Wolen, 685 A.2d 1384, 1386 n.4 (Pa.1996). However, the Court cited with approval the portion of Byers which set forth the following standard for determining what constitutes actual physical control:

With respect to what constitutes "actual physical control" in this Commonwealth, the courts have held that whether a person is in actual physical control of a motor vehicle is determined based on the totality of the circumstances, including the location of the vehicle, whether the engine was running and whether there was other

evidence indicating that the defendant had driven the vehicle at some point prior to the arrival of police on the scene.

Wolen, 685 A.2d at 1385. Although the engine was running, neither the location of the vehicle nor any other evidence indicated the defendant drove the vehicle prior to the arrival of the police in this case. While this Court would prefer a bright line test such as the engine running to satisfy the element of 'actual physical control', the Byers court held that starting a parked car, without more, is insufficient to prove actual physical control and this Court is bound by that decision.

The Commonwealth argues that if the evidence is insufficient for DUI, there is enough evidence to submit the case to the jury on an attempt theory. This Court cannot agree. The Court questions whether the offense of attempted DUI exists in this Commonwealth. The Court has found no cases regarding criminal attempt DUI. Furthermore, the DUI statute formerly contained the language "drive or attempt to drive." It could be argued that when the attempt to drive language was removed, the legislature intended to exclude attempt as a criminal offense. In the alternative, if the 'actual physical control' language is considered as another, more specific way of expressing an attempt to drive, Byers would be controlling and the evidence is insufficient. Moreover, the Court finds the evidence insufficient to show the defendant intended to drive, operate or be in actual physical control of the movement of a motor vehicle.

By The Court,

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Kenneth D. Brown, J.

cc: Daniel Holmes, Esq. (ADA)  
Edward J. Rymsza, Esq. (APD)  
Work File