The plaintiff is granted twenty (20) days from date hereof to file an amended complaint.

Exceptions are granted the plaintiff and the defendants.

COMMONWEALTH v. MYERS, C.P. Franklin County Branch, No. 166 of 1978

Driving While Intoxicated - Post Conviction Motions - Demurrer - Sufficiency of Evidence

1. The correctness of a Court's refusal to sustain a demurrer may not be raised once a defense is presented.

2. A verdict is not against the weight of the evidence if viewing all of the evidence admitted at trial in the light most favorable to the Commonwealth, and drawing all reasonable inferences therefrom, it is sufficient to enable the trier of fact to find every element of the crime charged beyond a reasonable doubt.

William C. Cramer, Esq., Assistant District Attorney, Attorney for the Commonwealth

Blake E. Martin, Esq., Public Defender, Attorney for the Defendant

OPINION AND ORDER

KELLER, J., December 29, 1978:

The defendant, Ronald E. Myers, was arrested and charged with driving under the influence and two summary offenses on April 3, 1978. He was represented by Blake E. Martin, Esq., Public Defender, at the preliminary hearing held on May 30, 1978, and he was bound over for trial. On July 10, 1978, the defendant waived the application of Pa. R. Crim. P. 1100, and requested a continuance of the case until September 11, 1978. The request was granted. On September 12, 1978 the defendant waived trial by jury and trial without jury was held on September 13, 1978. At trial the Commonwealth withdrew the two summary charges and the Court found the defendant guilty of operating under the influence. On September 21, 1978 post trial motions in arrest of judgment and for a new trial were filed. The post trial motions alleged that the verdict was against the evidence, the verdict was against the weight of the evidence, the verdict was against the law, and the Court erred in overruling defendant's demurrer to the evidence. By agreement of counsel and with approval of the Court the matter was submitted to the Court on briefs. It is now ripe for disposition.

At about 1:55 A.M. on April 3, 1978, Officers Haldeman and Thompson of the Chambersburg Police Department were detailed to proceed in their cruiser to the 600 block of Lincoln Way West, Chambersburg, Penna. and investigate an accident. Lincoln Way West is a two-lane street with one-way traffic West. Vehicular parking was permitted on the left side of the street at the accident scene.

The officers found a vehicle legally parked at the curb of Lincoln Way West and showing signs of heavy damage to the right rear portion of the vehicle. There were no other vehicles parked along the left or south curb of Lincoln Way West for a distance of 300 feet in either direction from the damaged vehicle, and debris in the highway. The officers proceeded in a westerly direction approximately 75 feet beyond the damaged parked vehicle to a point where they observed a station wagon with a heavily damaged left front parked in Haverstock's Upholstery Shop parking lot. An individual later identified as the defendant was standing on the left or driver's side of the station wagon. When the police cruiser entered the parking lot the individual ran, but was trapped by the cruiser in a cul de sac.

The individual was observed to be bleeding profusely from a head wound; when asked if he was the operator of the damaged station wagon he stated that he was not, and that Merle was. Due to the profuse bleeding, Officer Haldeman called for an ambulance to be dispatched to the parking lot. Officer Haldeman and another officer examined the damaged station wagon and in addition to the heavy damage on the left front, they observed fresh heavy concentrations of blood on the seat and back of the front seat on the driver's side as well as on the steering wheel and the left front door.

Officer Haldeman again talked to the defendant and the defendant again stated that he was not the driver of the vehicle. The officer observed that the defendant leaned and was unsteady on his feet, but his injury did not seem to affect him too much. He also observed that the defendant's speech was slurred, his eyes were glassy, he was excited, and he had the odor of alcohol on his breath. On the basis of these observations Officer Haldeman concluded that the defendant was under the influence of alcohol, had been involved in the accident with the parked car. He, therefore, advised the defendant of his Miranda rights and placed him under arrest. The defendant was taken to the Chambersburg Hospital by ambulance at 2:20 A.M.

At 3:30 A.M. Officer Haldeman again met with the defendant at the Chambersburg Hospital. The officer advised

the defendant of his Miranda rights. The defendant stated that he had not been driving the car; it was owned by his wife; it was driven by Norman and that he only had a permit. The defendant authorized the withdrawal of blood for the purpose of making a blood alcohol test and Dr. Allen did withdraw blood at 3:35 A.M. The blood sample was placed in a refrigerator until 10:00 A.M. when Officer Haldeman delivered it to the Pennsylvania State Police Crime Laboratory so that a blood alcohol test could be performed. The Assistant District Attorney and counsel for the defendant stipulated that the blood so withdrawn from the defendant was analyzed by a qualified expert and if called to testify would testify that the result of the analysis showed a blood alcohol reading of 0.22 percent alcohol in the blood.

Officer Haldeman had during his examination of the damaged station wagon found a hair in the window slot of the left front door where the window fits down. With the permission of the defendant a hair sample was taken from the defendant's head, and the hair sample together with the hair from the window slot were taken to the Pennsylvania State Police Crime Lab for comparison. The Assistant District Attorney and counsel for the defendant stipulated that a comparison of the hair sample and the hair found in the window slot was made by a qualified expert and if called to testify he would testify that there was no similarity in the hair submitted, and that there are up to 200 types of hair on any given head.

After the admission of certain exhibits the Commonwealth rested. The defense demurred on the grounds that:

1. The Commonwealth had not proven beyond a reasonable doubt that the damaged station wagon was the same car that struck a damaged car parked on the left side of Lincoln Way West.

2. The Commonwealth had failed to prove the corpus delicti; viz., that if there was an accident involving the damaged station wagon, there was no evidence to show what caused the accident.

3. The Commonwealth had not proven beyond a reasonable doubt that the defendant was operating the vehicle.

4. The Commonwealth was required to prove that the defendant was guilty of reckless driving because reckless driving is synonymous with unsafe driving, and unsafe driving is by analogy an element of the offense of driving under the influence. The demurrer was denied.

The defendant testified that his home was at R. D. 1, Harrisonville, Fulton County, Penna., and on April 2, 1978, his sister, brother-in-law and their two children had visited with him and his wife at their home; that he had been drinking there since three or four P.M. until about nine or ten P.M.; that he and his brother-in-law then went to another bar where they met Norman. After several hours at the bar, Norman agreed to drive the defendant's sister, brother-in-law and children to Gettysburg in defendant's vehicle, and then bring defendant back to Fulton County. While Norman was driving through Chambersburg on the return trip, and with the defendant asleep in the passenger side, the accident occurred.

The defendant awoke or came to and observed Norm leaving the car. He yelled at him, crawled out of the left front window of the station wagon, and ran after him, but didn't know where he went. He testified that he didn't know Norman's last name and had never seen him before. He also testified that he may have told Officer Haldeman that it was "Merle" that was the driver, but that was an accident. He also testified that he didn't remember running away from the police cruiser when it entered the parking lot.

On cross-examination the defendant testified that at the time of the accident his operating privileges were suspended, and that no damage was done to the passenger side of the station wagon in the accident.

The defendant's brother-in-law corroborated defendant's testimony concerning the meeting of Norman at the bar; that Norman drove the car to Gettysburg, and that Norman was driving when he and the defendant left Gettysburg some time after midnight.

The defendant's primary argument for post trial relief is predicated upon his contention that the Court erred in refusing to sustain his demurrer. In *Commonwealth v. Cristina*, Pa. , 391 A. 2d 1307, 1309 (1978), footnote 1, a unanimous Supreme Court stated:

> "Cristina frames this question in terms of whether the trial court erred in overruling his demurrer to the Commonwealth's evidence. However, the correctness of this ruling is no longer an available issue since Cristina did not rest following the adverse ruling but instead presented a defense. See *Commonwealth v. Ilgenfritz*, 466 Pa. 345, 353 A. 2d 387 (1976); *Commonwealth v. Moore*, 398 Pa. 198, 157 A. 2d 65 (1959); *Commonwealth v. Spanos*, 167 Pa. Super. 629, 76 A. 2d 243 (1950)."

We find no merit in the defendant's contention and it is dismissed.

We will consider the defendant's contentions that the verdict was against the evidence, against the weight of the evidence and against the law as one overall issue whether the evidence was legally sufficient to sustain the Court's verdict.

> "The test is whether, viewing all of the evidence admitted at trial in the light most favorable to the Commonwealth and drawing all reasonable inferences therefrom, is it sufficient to enable the trier of fact to find every element of the crime charged beyond a reasonable doubt."

Commonwealth v. Cristina, supra, page 1309. The findings of a judge sitting without jury are entitled to the same weight as a jury verdict. *Commonwealth v. Dawkins*, 223 Pa. Super. 33, 297 A. 2d 144 (1972). It is hornbook law that a trier of fact may believe all, some or none of the evidence introduced.

The three elements of the crime of driving under the influence are:

1. That the defendant was the operator of the vehicle.

2. That the defendant was under the influence of alcohol.

3. That the defendant was under the influence to the extent that he could not safely operate the motor vehicle.

In the case at bar, the defendant was the only person found at the scene and he was observed standing outside the damaged station wagon on the driver's side. He was the only person bleeding and fresh blood was observed on the left front seat, steering wheel, and left front window. The defendant exited through the window on the driver's side of the station wagon. There was no evidence that the door on the operator's side was inoperable. The defendant ran when the police cruiser entered the parking lot. The defendant's wife was apparently the owner of the station wagon. The defendant's right to operate a motor vehicle was suspended at the time. The defendant gave two different first names for the individual who allegedly was driving and was unable to supply any surname. In our judgment this combination of facts establishes beyond a reasonable doubt that the defendant was the operator of the motor vehicle.

The testimony of Officer Haldeman as to his observations which led him to the conclusion that the defendant was under

the influence, when coupled with the blood alcohol test results, proves beyond a reasonable doubt that the defendant was under the influence of alcohol.

Lincoln Way West in the Borough of Chambersburg at the scene of the accident is a one-way street West with two traffic lanes, excluding vehicle parking area on the left or South side of the street. When the operator of a vehicle who is under the influence of alcohol strays from the traffic lane and strikes the only vehicle within a distance of 600 feet, and that vehicle is legally parked, the conclusion is inescapable that the operator was incapable of safe driving by reason of being under the influence.

We, therefore, conclude the defendant's boiler plate post trial motions 2, 3 and 4 are without merit, and they are dismissed.

ORDER OF COURT

NOW, this 29th day of December, 1978, the defendant's post trial motions are dismissed.

The Probation Department of Franklin County is directed to make a Pre-Sentence Investigation and file a Pre-Sentence Report.

The defendant shall appear for sentencing upon the call of the District Attorney after the Pre-Sentence Report has been completed and filed.

Exceptions are granted the defendant.

BOYER ET AL. v. BOYER, C.P. Franklin County Branch, No. F.R. 1978-418-S, F.R. 1978-425-S

Support - College Expenses - Spouse's Earning Capacity

1. In determining whether a parent owes a duty to support his children while they are attending college the Court will not consider the earning capacity of the spouse who has chosen to remain at home with the couple's three year old child.

William C. Cramer, Esq., Assistant District Attorney, Attorney for Plaintiff

William F. Kaminski, Esq., Attorney for Defendant