

Commonwealth v Weaver

COMMONWEALTH OF PENNSYLVANIA v. LARRY FRANCIS WEAVER, Defendant
Court of Common Pleas of the 39th Judicial District,
Franklin County Branch
Criminal Action No. 516-2010

NOTE: The appeals of this case are at Superior Court Docket Nos. 1973 MDA 2012 and 1870 MDA 2012.

Criminal Law: Driving Under the Influence: Admissibility of Evidence: Field Sobriety Tests

1. In a prosecution for DUI, the results of a horizontal gaze nystagmus (HGN) test are not admissible at trial to prove intoxication.
2. HGN test results are admissible in a pretrial suppression hearing to prove that the arresting officer had probable cause to arrest the driver for DUI.

Criminal Law: Right of Accused to Confront Witnesses

1. The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to confront the witnesses against him.
2. The Confrontation Clause bars admission of out-of-court testimonial statements, unless the witness testifies at trial or defendant had a prior opportunity to cross-examine the witness who made the statements.
3. When the Commonwealth seeks to introduce a laboratory report containing testimonial statements, it must produce the laboratory technician who certified the report.
4. The Commonwealth satisfies the Confrontation Clause where it produces a technician who certified a laboratory report, even if that technician did not personally conduct the tests that are the subject of the report.

Costs: Liability of Defendant for Costs: Criminal Laboratory User Fee

1. A person convicted of a crime is liable for the costs of prosecution.
2. The costs of prosecution include the cost of sending a laboratory technician to court proceedings.
3. A defendant is not liable for the increase in costs resulting from Commonwealth errors or oversights that necessitate a continuance of trial.

LEGAL POINTS

ADMISSIBILITY OF HORIZONTAL GAZE NYSTAGMUS TEST RESULTS

The results of a horizontal gaze nystagmus (HGN) test, a field-sobriety test, are not admissible in a DUI prosecution to prove that the defendant was operating a motor vehicle under the influence of alcohol or a controlled substance. HGN test results are, however, admissible at a pretrial suppression hearing to support an arresting officer's determination of probable cause to arrest for DUI.

CONFRONTATION CLAUSE AND LABORATORY REPORTS

The Confrontation Clause prohibits the admission of out-of-court testimonial statements unless the prosecution produces the witness who made those statements, or the defendant had a prior opportunity to cross-examine the witness. If the Commonwealth wishes to introduce results contained in a laboratory report, it must produce the technician who certified the results. The appropriate expert is the certifying technician, even if that person did not personally conduct the tests described in the report.

LIABILITY FOR COSTS

A person convicted of a crime is liable for the costs of prosecution. Those costs include the fee for sending a laboratory technician to court proceedings. However, where a Commonwealth oversight or mistake necessitates a continuance and costs increase as a result, the defendant is not liable for the increase.

OPINION

Walsh, J.

These are cross appeals by Defendant Larry Francis Weaver and the Commonwealth. Convicted of two counts of DUI^[1], Weaver appeals his judgment of sentence, challenging the admission of evidence in a suppression hearing and at trial. The Commonwealth cross-appeals the Court's post-sentence order reducing the costs owed by Weaver. The Court believes that we did not err in the course of these proceedings and respectfully request the Superior Court to affirm Weaver's judgment of sentence and our decision granting Weaver's post-sentence motion.

BACKGROUND

The Court has issued three prior relevant opinions: an Opinion dated September 23, 2010; a Decision dated September 1, 2011; and an Opinion dated October 2, 2012. All three are attached. For the detailed factual history, see the 9/23/10 Opinion 1-3, and the 9/1/11 Decision 2-3. Briefly, State Police stopped Weaver after a concerned citizen noticed him driving very erratically. Weaver failed a horizontal gaze nystagmus (HGN) field-sobriety test, and was arrested. Tests revealed that Weaver had diazepam, nordiazepam, and morphine in his blood. On September 23, the Court denied Weaver's suppression motion in which he challenged, inter alia, the probable cause to arrest him for DUI. After two days of trial on March 23, 2011 and June 29, 2011, the Court found Weaver guilty of DUI (schedule II or III substance) and DUI (drug or combination of drugs). We sentenced Weaver to 6 months' intermediate punishment, including 72 hours on work release and 6 weeks on electronic monitoring, on June 13, 2012.^[2] Weaver filed a post-sentence motion alleging that he should not have had to pay the costs of expert witness attendance for the second day of trial, see 42 Pa. C.S. § 1725.3. On October 2, 2012, we granted Weaver's post-sentence motion and reduced the criminal laboratory user fee portion of the taxable costs from \$13,442.89 to \$6,520.35.

On October 24, 2012, Weaver timely appealed his judgment of sentence. See Pa. R. Crim. P. 720(A)(2)(a); Pa. R.A.P. 903(a). On November 7, 2012, the Commonwealth timely cross-appealed. See Pa. R.A.P. 903(b). Both Parties have filed cross statements of errors complained of on appeal as ordered.

DISCUSSION

Combined, the cross appeals raise three issues. The Court has addressed each in each of our prior three opinions. In the discussion below, the relevant opinion is in parenthesis after each heading.

I. Weaver's Appeal

A. Admission of the HGN Test at the Suppression Hearing (9/23/10 Opinion)

First, Weaver argues that:

The trial court erred in finding that there was probable cause to arrest Weaver. The trial court err[ed] in allowing evidence related to Weaver's performance on the [HGN test] to be admitted in support of probable cause to arrest.

Weaver's Concise Statement ¶ 1 (paragraphing altered).

In reviewing a denial of a suppression motion, the Superior Court "is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct." Commonwealth v. Hoppert, 39 A.3d 358, 361-62 (Pa. Super. 2012) (quoting Commonwealth v. Jones, 988 A.2d 649, 654-56 (Pa. 2010)), alloc. denied, No. 173 MAL 2012 (Pa. Nov. 28, 2012).

Weaver argued that the Commonwealth must meet the Frye^[3] standard to admit HGN test results at a suppression hearing. The Court rejected that argument, noting that Weaver was unable to produce any binding authority in support. 9/23/10 Opinion 6 & n.3. Finding no Pennsylvania appellate case law, the Court relied on State v. Ruthardt, 680 A.2d 349, 354 (Del. Super. New Castle 1996) (holding that HGN test results are admissible to support probable cause to arrest). See also City of Wichita v. Molitor, 268 P.3d 498 (Kan. Ct. App. 2012) (same).

The results of an HGN test are not admissible to prove intoxication. But all appellate case law addresses HGN test results' admissibility at trial. See, e.g., Commonwealth v. Moore, 635 A.2d 625 (Pa. Super. 1993); Commonwealth v. Miller, 532

A.2d 1186 (Pa. Super. 1987). Although the Superior Court has never directly addressed the admissibility of HGN test results in a suppression hearing, we believed that it would hold that HGN test results are admissible to support a determination of probable cause. See 9/23/10 Opinion 6-8.

The Frye test requires the proponent of scientific or technical evidence to show that it is generally accepted in the relevant field. *Topa*, 369 A.2d at 1282. Doing so prevents a fact-trier from being blinded with junk science. But a suppression hearing does not determine the ultimate factual dispute in a criminal proceeding (the defendant's guilt). Rather, the issue is whether the arresting officer, under the totality of the circumstances, believed that the defendant committed a crime. *Commonwealth v. Thompson*, 985 A.2d 928, 931 (Pa. 2009). Whether Weaver was actually intoxicated—or whether the HGN test reliably indicated that he was—was irrelevant. What mattered was the arresting trooper's reasonable belief, under the totality of the circumstances, that Weaver was driving while intoxicated. Cf. *City of Wichita*, 268 P.3d at 502.

Furthermore, the HGN test was merely one piece of the puzzle in the Court's probable cause determination. In our prior Opinion, we noted that the arresting trooper had information that Weaver was swerving in and out of his lane of travel and altering speed between 25 and 55 miles per hour. The arresting state trooper personally saw Weaver drifting in and out of his lane of travel and noticed that his pupils were constricted. Finally, another trooper found prescription valium and suboxone in the car. Based on the totality of the circumstances, the Court found that police had probable cause to arrest Weaver. See 9/23/10 Opinion at 8.

For the foregoing reasons, and the reasons in our September 23, 2010 opinion, the Court believes that we properly allowed evidence of the HGN test at trial.

B. Confrontation Rights at Trial (9/1/11 Decision)

Second, Weaver argues that:

The trial court erred in finding that there was sufficient evidence to convict Defendant of DUI and the error, in large part, was because NMS lab personnel testimony was admitted in violation of the Confrontation Clause of the Constitution.

Weaver's Concise Statement ¶ 2.

Weaver challenges this Court's ruling regarding his right to confront witnesses, a question of law. Therefore, the Superior Court's standard of review is de novo and its scope plenary. *Commonwealth v. Dyarman*, 33 A.3d 104, 106 (Pa. Super. 2011) (citing *Commonwealth v. Atkinson*, 987 A.2d 743, 745 (Pa. Super. 2009)), alloc. granted, 41 A.3d 1282 (Pa. 2012).

During the second day of trial, Weaver's counsel objected to the admission of the NMS Labs report which tended to prove that his blood contained morphine. See N.T. (Trial Day 2) 6/29/11, at 70-74. The Court took the objection under advisement. In a written opinion, we overruled the objection and stated our reasons in support. 9/1/11 Decision 3-6. We found that Weaver's Sixth-Amendment right to confront witnesses, as interpreted by *Crawford v. Washington*, 541 U.S. 36 (2006), and its progeny, were not violated. 9/1/11 Decision 3-6.

Commonwealth v. Yohe, 39 A.3d 381 (Pa. Super. 2012), which posts-dates the Court's decision, bolsters our reasoning. In *Yohe*, the court held that the Commonwealth satisfies a defendant's confrontation rights when it produces the person who analyzed laboratory tests and certified the report, even if that person did not personally conduct the tests. *Id.* at 389-90. Indeed, Weaver conceded (for purposes of the criminal laboratory user fee) that Dr. Sherri Kacinko was the only witness required by the Confrontation Clause. See Def.'s 6/22/12 Post-Sent. Mot. ¶ 14(b).

Based on the foregoing, and especially in light of *Yohe*, the Court believes we correctly overruled Weaver's confrontation clause objection.

II. The Commonwealth's Cross Appeal (10/2/12 Opinion)

In its cross-appeal, the Commonwealth presents the following issue for review:

The trial court erred in partially granting the Defendant's post sentence motion when it absolved the Defendant of the obligation to pay for the costs of expert testimony on the second day of trial, June 29, 2011.

Com.'s Concise Statement ¶ 1.

This Court's decision regarding assessment of costs is reviewed de novo. *Commonwealth v. Garzone*, 993 A.2d 306, 316 (Pa. Super. 2010), *aff'd*, 34 A.3d 67 (Pa. 2012); *Commonwealth v. Mazer*, 24 A.3d 481, 483 (Pa. Cmwlth. 2011).

We will not repeat our analysis contained in our October 2, 2012 opinion. We found that the Commonwealth must bear the

costs of expert testimony for the second day of trial. It failed to file an information charging Weaver with DUI (drug or combination of drugs) under 75 Pa. C.S. § 3802(d)(2). Our allowance of amendment necessitated a continuance, a second day of trial, and the recalling of the Commonwealth's laboratory witnesses. We held that the Commonwealth could not charge Weaver for its own oversight in drafting the information. 10/2/12 Opinion 7-9. "The Commonwealth cannot switch horses midstream and saddle a defendant with the cost of the second mount." Id. at 9

CONCLUSION

The Court believes that we properly denied Weaver's suppression motion and his Confrontation-Clause objection at trial. We further believe that we properly reduced the amount of the criminal laboratory user fee by granting Weaver's post-sentence motion. Therefore, we believe we committed no error in any aspect of the Weaver's trial and sentencing, or in modifying the taxable costs post-sentence. We respectfully urge that the Superior Court affirm this Court's judgment of sentence and the decision granting the Defendant's post-sentence motion.

Respectfully submitted,

ORDER OF COURT

December, 2012, the Clerk of Courts is directed to transmit this Opinion and Order and the record of these proceedings to the Superior Court.

Pursuant to the requirements of Pa. R. Crim. P. 114 (B)(1), (2) and (C)(1), (2), the Clerk shall promptly serve this Order or court notice on each party's attorney, or the party if unrepresented; and shall promptly make docket entries containing the date of receipt in the Clerk's office of the Order or court notice; the date appearing on the Order or court notice; and the date and manner of service of the Order or court notice.

[¹]75 Pa. C.S. § 3802(d)(1)(ii) (schedule II or III substance) and § 3802(d)(2) (drug or combination of drugs)

[²]Weaver's poor health caused several delays in this case.

[³]Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); see Commonwealth v. Topa, 369 A.2d 1277 (Pa. 1977) (adopting the Frye test).