

[J-179-98]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : No. 35 W.D. Appeal Docket 1998
:
Appellee : Appeal from the Order of the Superior
: Court of Pennsylvania, No. 1385 PGH
: 1996, dated May 9, 1997, reversing in part
v. : and affirming in part the Judgment of
: Sentence entered June 24, 1996 in the
: Court of Common Pleas of Indiana
SHANE FARRON MCCURDY, : County, Criminal Division, at No. 786
: Crim. 1995.
Appellant :
:
: ARGUED: September 17, 1998

CONCURRING OPINION

MR. JUSTICE ZAPPALA

DECIDED: AUGUST 3, 1999

Because of the majority's discussion regarding whether the Commonwealth needed to present testimony relating Appellant's BAC test result back to the time when he was actually driving I concur only in the result.¹ In this Court's most recent decision involving

¹ The reason that the issue of relation back testimony is important is because in many cases involving DUI charges the police have no direct evidence that a defendant had a particular blood alcohol content at the time of driving, and thus the Commonwealth must rely upon an inference to establish that the defendant did have a certain BAC level at the time he or she was driving. That inference is drawn from a BAC test that is administered after the defendant ceased driving. The problem that exists is that a variety of factors affect when alcohol is absorbed into a particular individual's blood, which is when that person feels the effects of the alcohol. A plethora of considerations go into determining how probative a post-driving BAC test is of a person's condition while he or she had been driving. Those considerations include, inter alia, the persons height, weight, metabolism, what they had eaten and how long ago, when they consumed their last drink, and how many drinks they consumed within a particular time frame. See Robert J. Schefter, Under the Influence of Alcohol Three Hours After Driving: The Constitutionality of the (a)(5) Amendment to Pennsylvania's DUI Statute, 100 Dick.L.Rev. 441, 465-466 (1996). Without (continued...)

relation back testimony we entered an arrest of judgment on a DUI conviction due to the Commonwealth's failure to present evidence relating BAC test results back to the time that the defendant had been driving. See Commonwealth v. Shade, 681 A.2d 710 (Pa. 1996). Although Shade involved a charge based upon subsection (a)(4) alone, and this case involves (a)(1),² both sections pertain to a person's condition at the time he or she was driving. Therefore, the temporal concerns underpinning our decision in Shade are equally relevant in cases involving (a)(1) such as this one.^{3 4}

Whether in an (a)(1) context or an (a)(4) context the probative value of any BAC test result comes from the expert who explains to the jury what the post-driving BAC test result means with respect to the defendant's condition at the time of driving. See footnote 1, supra. Otherwise, there is a dangerous possibility of a conviction based upon jurors' incomplete understanding of what insight a BAC test result provides into a defendant's condition at the time of driving. Such uninformed speculation should not be the basis for a DUI conviction especially where that conviction underlies a crime as serious as the

(...continued)

expert testimony explaining the probative value of a BAC test result under the circumstances of a particular case there is a dangerous possibility of an unfair conviction based upon the uninformed speculation of jurors.

² Appellant was charged based upon subsection (a)(4), but was not convicted on that basis.

³ Inconsistencies in BAC testing such as those that were evident in Shade, 681 A.2d at 711, where a BAC test result of .157% was followed only one minute later with a result of .147%, also raise a concern for the potentially prejudicial effect of admitting such a result without supporting testimony interpreting it.

⁴ Superior Court noted that the BAC test in this case was not administered until approximately two and one-half hours after Appellant ceased driving.

homicide while driving under the influence charge in the case at bar. This is particularly true in a case such as this one, where the defendant stipulates to having consumed alcohol and therefore the test result adds almost nothing of probative value unless an expert is willing and able to explain how such a result can be helpful to the jury in assessing the defendant's condition at the time of driving.

Nonetheless, because the focus in the case before us is whether the jury may have relied upon the unconstitutional subsection (a)(5), see Commonwealth v. Barud, 681 A.2d 162 (Pa. 1996), as the predicate offense to its homicide by vehicle while driving under the influence conviction, rather than squarely presenting the issue of whether the Commonwealth should have been required to present testimony explaining the probative value of the BAC test result as related to the time when Appellant was actually operating his vehicle, I concur in the result.⁵

Mr. Justice Nigro joins this concurring opinion.

⁵ I also note my belief that our Court should address some of the apparent inconsistencies that exist in the law with respect to relation back testimony, as soon as the appropriate case presents itself. As discussed above, most recently, in Shade, 681 A.2d at 710, we held that it was error for the trial court to relieve the Commonwealth from having to present relation-back evidence, and therefore arrested the judgment against the defendant. Yet in Commonwealth v. Yarger, 648 A.2d 529 (Pa. 1994), this Court had held that once the Commonwealth has established that the defendant's blood alcohol content reflects an amount above 0.10% (without relation-back testimony) it has made a prima facie case under §3731(a)(4). When read together, the two decisions create an odd result. Yarger allows the Commonwealth to get to the jury without presenting relation-back testimony, however, if a jury then convicts a defendant and there was no relation-back testimony offered by the Commonwealth, then, under Shade, the conviction may not stand. The problems resulting from these two decisions is perhaps best illustrated by a recent Superior Court decision where, based upon Yarger, it reversed a trial court's decision, based upon Shade, not to admit a BAC test result without relation back testimony. See Commonwealth v. Allbeck, 715 A.2d 1213 (Pa. Super. 1997), allocatur pending, 748 M.D. Alloc. Dkt. 1998. I would be inclined to agree with the trial court's rationale, which relied upon the reasoning in our more recent Shade decision.