

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

JASON RICHARD SCHILDT,

Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 196 MDA 2013

Appeal from the Order entered December 31, 2012,  
in the Court of Common Pleas of Dauphin County,  
Criminal Division, at No(s): CP-22-CR-0002191-2010.

BEFORE: GANTMAN, ALLEN, and MUNDY, JJ.

MEMORANDUM BY ALLEN, J.

**FILED SEPTEMBER 05, 2013**

The Commonwealth appeals from the trial court's order granting the motion filed by Jason Richard Schildt ("Appellee"), and quashing the Commonwealth's criminal information charging a violation of 75 Pa.C.S.A. section 3802(c). We reverse and remand for trial.

The trial court summarized the pertinent facts and prolonged procedural history as follows:

On January 16, 2010, at approximately 2:11 a.m., [Appellee] was involved in a single vehicle accident on Beagle Road in Londonderry Township, Dauphin County, Pennsylvania. Pennsylvania State Police Trooper Jeremy Baluh arrived on the scene and observed [Appellee's] vehicle resting on its side in the creek next to Beagle Road. Upon Trooper Baluh's initial contact with [Appellee], he noticed that [Appellee] was speaking with slurred speech, had a strong odor of alcohol on his breath, and his eyes were red. [Appellee] was wet from being in the creek, was not wearing his shoes, was unsure of his footing and staggered as he walked. [Appellee] admitted

that he had consumed multiple alcoholic beverages prior to operating his vehicle. Based on Trooper Baluh's observations of [Appellee], Trooper Baluh formed the opinion that [Appellee] was incapable of safe driving and placed [Appellee] under arrest. There is absolutely no dispute by [Appellee] that Trooper Baluh possessed the requisite probable cause to arrest [him] for DUI.

[Appellee] was transported by Trooper Baluh to the nearby Middletown Borough Police Department Headquarters for a legal breath test which was conducted by Officer Ben Lucas of the Middletown Police Department. Officer Lucas is a certified breath test operator in the Commonwealth of Pennsylvania. Officer Lucas performed the breath test on [Appellee] after a twenty (20) minute observation period in which [Appellee] did not eat, drink, vomit, regurgitate or smoke. The test was performed utilizing an Intoxilyzer 5000EN, a device manufactured by CMI, and is a device certified by the DOH and PennDOT as an "approved device" for breath testing to determine blood alcohol content. The device used by Officer Lucas was field verified for calibration on January 9, 2010 and tested for accuracy on January 9, 2010 as well. The test was done within two hours of the time [Appellee] was operating a motor vehicle. The results of the two breath samples provided by [Appellee] were 0.208% and 0.214%.

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[Appellee] was charged on January 16, 2010 with two counts of DUI [75 Pa.C.S.A. § 3802(a)(1) and 75 Pa.C.S.A. § 3802(c)] and Driving on Roadways Laned for Traffic [75 Pa.C.S.A. § 3309(1).] After a Preliminary Hearing . . . conducted on May 6, 2010, all charges were bound over for disposition in the Court of Common Pleas of Dauphin County. . . .

[Appellee] was scheduled to appear for Formal Arraignment on June 3, 2010. However, [Appellee] signed a Waiver of Appearance at Formal Arraignment (hereinafter Waiver of Appearance) which was filed on May 21, 2010. Despite [Appellee's] signed and filed Waiver of Appearance, a Bench Warrant was somehow issued for [Appellee's] arrest. The Commonwealth filed a Motion to Lift Bench Warrant on June 24, 2010, which was granted

on June 25, 2010. On August 18, 2010, [Appellee] . . . requested a continuance. His request was granted and the case was scheduled for [trial on] October 20, 2010. On August 27, 2010, [Appellee], through counsel, filed a "Motion to Quash Criminal Information to Wit: The Charge of 18 [sic] PA.C.S.A. §3802(c) Driving Under the Influence-Highest Rate of Alcohol as the Commonwealth is Using Evidentiary Breath Testing Devices That Cannot Scientifically Prove the Quantification for Values Above 0.15 and as such Cannot Prove an Essential Element of the Crime Charged Due to this Inability to Quantify Values Outside of the Demonstrated Linear Dynamic Range" (hereinafter "Motion to Quash").

When this Court was assigned by Court Administration to determine this evidentiary matter involved in the Motion to Quash, we noted the rather unusual scope and attendant issues embedded in the Motion, and we therefore undertook additional measures to include various Commonwealth agencies in the disposition of this matter at a fairly early stage in the proceedings. The Court clearly sensed from the initial filing of the Motion to Quash by [Appellee's] counsel that the scientific issues, and the direct implication of evidentiary and constitutional law issues attendant to this case could have a profound effect upon similar cases in this Judicial District, and indeed across the Commonwealth. It was also apparent that the instant matter may well be a case of first impression in the Commonwealth. Accordingly, the Court held Pre-Hearing Conferences on February 10, 2011, and again on November 28, 2011 to which we specifically extended invitations to several different Commonwealth agencies, including the Attorney General's Office, the Department of Transportation, the Department of Health, and the Pennsylvania State Police to fully participate in such Conferences. No other Commonwealth agency appeared at said Conferences, but sent correspondence to the Court thanking us for extending such invitations, and clearly indicated that each agency was comfortable with the representation provided on behalf of the Commonwealth by the Dauphin County District Attorney's Office, and that their agency would not be participating in the Pre-Hearing Conferences or the Hearing on the merits of the Motion to Quash. However, as the case progressed, it became

rather unsettling to the Court that these Commonwealth agencies did not opt to at least participate in the Conference which would have certainly illuminated the potential state-wide implications emanating from the fundamental issues associated with this case. It is for that very reason of initial non-response that we renewed our initial invitation of January 20, 2011, and re-invited those same agencies to attend the subsequent Conference on November 21, 2011. But alas, our invitations went chiefly unheeded.

After discovery was completed by the parties and expert reports were prepared and filed, an Evidentiary Hearing was scheduled for April 16<sup>th</sup>, 19<sup>th</sup>, 23<sup>rd</sup>, and 24<sup>th</sup> of 2012. On April 16, 2012, [Appellee] presented testimony from Dr. Lee N. Polite; on April 19, 2012, [Appellee] presented the testimony from Dr. Jerry Messman; on April 23, 2012, [Appellee] presented testimony from Dr. Jimmie Valentine and the Commonwealth presented partial testimony from its prime witness, Mr. Brian T. Faulkner. The Commonwealth concluded the Evidentiary Hearing with its witness, Mr. Faulkner, on April 24, 2012.

Trial Court Opinion, 12/31/12, at 4-9 (footnotes omitted).

Following the submission by the parties of proposed findings of fact and conclusions of law, as well as memorandums of law and responses thereto, the trial court, by order entered December 31, 2012, granted Appellee's motion, and quashed the count charging 75 Pa.C.S.A. section 3802(c). This timely appeal by the Commonwealth followed.

The Commonwealth presents the following question:

- A. WHETHER THE TRIAL COURT ERRED IN GRANTING [APPELLEE'S] MOTION TO QUASH CRIMINAL INFORMATION WHEN THE COMMONWEALTH HAD MET ALL THE EVIDENTIARY REQUIREMENTS PROVIDED BY THE STATUTE, [75] Pa.C.S.A. §1547(C) TO PUT FORWARD A VALID BREATH TEST RESULT IN THE

PROSECUTION OF A DUI AS CHARGED UNDER 75  
Pa.C.S.A. §3802(c)?

Commonwealth Brief at 4.

Appellee's motion to quash essentially sought *habeas corpus* relief prior to trial. This Court has summarized:

The decision to grant or deny a petition for writ of habeas corpus will be reversed on appeal only for a manifest abuse of discretion. It is settled that a petition for writ of habeas corpus is the proper means for testing a pre-trial finding that the Commonwealth has sufficient evidence to establish a *prima facie* case. Although a habeas corpus hearing is similar to a preliminary hearing, in a habeas corpus proceeding the Commonwealth has the opportunity to present additional evidence to establish that the defendant has committed the elements of the crime charged.

A *prima facie* case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime. ***The Commonwealth need not prove the defendant's guilt beyond a reasonable doubt.*** Rather, the Commonwealth must show sufficient probable cause that the defendant committed the offense, and the evidence should be such that if presented at trial, and accepted as true, the judge would be warranted in allowing the case to go to the jury. ***Commonwealth v. Fountain***, 811 A.2d 24, 25-26 (Pa. Super. 2002) (quotations, quotation marks, and citation omitted). "In determining the presence or absence of a *prima facie* case, inferences reasonably drawn from the evidence of record that would support a verdict of guilty are to be given effect, but suspicion and conjecture are not evidence and are unacceptable as such." ***Commonwealth v. Packard***, 767 A.2d 1068, 1071, (Pa. Super. 2001) (citation omitted).

***Commonwealth v. Keller***, 823 A.2d 1004, 1010-11 (Pa. Super. 2003) (emphasis added).

In granting Appellee's motion, the trial court in this case was "constrained to agree" with Appellee "that the Commonwealth is unable to prove an essential element of its case beyond a reasonable doubt as it pertains to a charge of DUI brought pursuant to 75 Pa.C.S. §3802(c)." Trial Court Opinion, 12/31/12, at 16-17. Given the above case law, however, the trial court manifestly abused its discretion in granting pre-trial *habeas corpus* relief based upon its determination that the Commonwealth failed to prove beyond a reasonable doubt the accuracy of Appellee's blood alcohol content. In short, the trial court prematurely and improperly held the Commonwealth to its burden of proof at trial, in granting Appellee's pre-trial motion to quash the complaint.

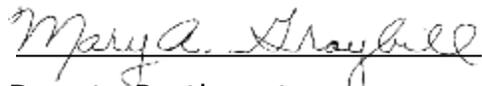
In order to survive the *habeas corpus* challenge in this case, the Commonwealth was required to establish a *prima facie* case that Appellee was driving or was in actual physical control of a vehicle on a road of the Commonwealth, and that he had a blood alcohol content of 0.16 or greater within two hours of driving. 75 Pa.C.S.A. § 3802(c). We cannot agree with Appellee's suggestion that the trial court properly granted his motion to quash because the Commonwealth's proof of Appellee's blood alcohol content was "simply suspicion and conjecture." Appellee's Brief at 18. Given the test results at issue, the Commonwealth established, at least *prima facie*, a violation of section 3802(c). Any issue regarding the accuracy

of the breath test affects the weight of the evidence and can be challenged at trial. **See Keller**, 823 A.2d at 1013 (explaining that although the BAC results might be subject to exclusion at trial, that fact is irrelevant to the question of whether the evidence established a *prima facie* case).

Accordingly, we find that the trial court abused its discretion when it granted *de facto habeas corpus* relief, as the Commonwealth met its burden of establishing, at least *prima facie*, that Appellee committed the act proscribed under 75 Pa.C.S.A. section 3802(c). We therefore reverse the trial court's order and remand the case for trial.

Order reversed. Case remanded. Jurisdiction relinquished.

Judgment Entered.

  
Deputy Prothonotary

Date: 9/5/2013