

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

COMMONWEALTH OF PENNSYLVANIA,	IN THE SUPERIOR COURT OF
	PENNSYLVANIA
Appellee	:
	:
v.	:
	:
ROBERT F. WICKHAM,	:
	:
Appellant	: No. 2114 MDA 2012

Appeal from the Judgment of Sentence November 3, 2012,  
Court of Common Pleas, Luzerne County,  
Criminal Division at No. CP-40-CR-0000275-2012

BEFORE: DONOHUE, WECHT and COLVILLE\*, JJ.

MEMORANDUM BY DONOHUE, J.:

**FILED AUGUST 13, 2013**

Robert F. Wickham (“Wickham”) appeals from the judgment of sentence entered on November 3, 2012 by the Court of Common Pleas, Luzerne County, following his convictions of homicide by vehicle while driving under the influence, driving under the influence of alcohol (general impairment), driving under the influence of alcohol (high rate of alcohol), reckless driving, and careless driving.<sup>1</sup> Upon review, we affirm.

The trial court summarized the facts of the case as follows:

The Commonwealth filed the charges as a result of [Wickham]’s actions on March 7<sup>th</sup> of 2011 at approximately 6:09 p.m. when, while employed as a tow truck operator, he was dispatched to pick up a vehicle at the Social Security Administration parking lot located in Plains Township, Luzerne County. When [Wickham] attempted to reposition the subject

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<sup>1</sup> 75 Pa.C.S.A. §§ 3735(a), 3802(a)(1), (b), 3736, 3714(a).

\*Retired Senior Judge assigned to the Superior Court.

vehicle, he struck the vehicle owner, Denise Polinchak [‘the victim’]. The police upon arrival detected an order of alcohol on [Wickham]’s breath and this fact coupled with other indicia of impairment led the police to request a chemical test after providing [Wickham] with the required warnings and informed consent. Thereafter, [Wickham] provided a blood sample drawn at approximately 6:55 p.m. on the same date, which when tested on March 9<sup>th</sup>, 2011, yielded a [blood alcohol content] of 0.114%.

Tragically, on March 9<sup>th</sup> of 2011[,] the investigators were informed [the victim] died from the injuries sustained when struck by her vehicle, which [Wickham] was operating.

Trial Court Opinion, 2/19/13, at 1-2.

On April 2, 2012, the trial court held a pretrial conference. Of particular relevance to this appeal, at that time, counsel for Wickham stated that the defense intended to file a motion for inspection of the victim’s vehicle. The Commonwealth indicated that it did not have the vehicle, as it had been released to the insurance company, and suggested that defense counsel contact the insurance company to set up a mutually agreeable time to inspect the car. The trial court indicated that counsel for Wickham could seek court intervention if necessary, but should do so prior to the motions deadline.

On June 29, 2012, Wickham filed a Motion for Compulsory Disclosure, Discovery and Inspection, seeking, *inter alia*, production of the victim’s vehicle for inspection and production of Wickham’s blood sample taken for the blood alcohol test. On August 1, 2012, Wickham filed a Motion for

Sanctions Pursuant to Rule 573(E), seeking suppression of any evidence related to the inspection or operability of the victim's vehicle and blood test results based upon the Commonwealth's failure to comply with the aforementioned request for discovery. The Commonwealth responded, indicating that it was not in possession of either piece of evidence. At the August 10, 2012 hearing on the motions, the Commonwealth asserted that the blood had been in the possession of Wilkes-Barre General Hospital, which destroyed the blood after 90 days pursuant to hospital policy, and the victim's car was in the possession of the attorney representing the victim's widower. Counsel for Wickham stated that inspection of the vehicle was necessary, as counsel believed the idle on the car was set high, which would have contributed to the accident, in addition to the brake failure. Counsel further asserted that the blood might be exculpatory, as Wickham is an insulin-dependent diabetic, and his condition could have affected his blood-alcohol level. Although invited by the trial court to do so, Wickham did not present any witnesses in support of his position. The trial court denied Wickham's requests for compulsory discovery and sanctions on August 31, 2012.

The case proceeded trial, at which a jury found Wickham guilty of the three charges submitted for its consideration. The trial court found Wickham guilty of the two summary offenses. On November 3, 2012, the trial court sentenced Wickham to 48 to 96 months of incarceration.

Wickham filed a timely notice of appeal. He raises three issues for our review:

- A. Whether the evidence was sufficient to support a conviction for homicide by vehicle while driving under the influence pursuant to 75 Pa.C.S. § 3735(a) where the Commonwealth failed to prove that the death was caused by [Wickham]'s violation of 75 Pa.C.S. § 3802?
- B. Whether the [trial court] erred by failing to suppress the evidence of [Wickham]'s blood alcohol content where [Wickham]'s Fourteenth Amendment right to due process was violated because the Commonwealth failed to provide [Wickham] with the opportunity to conduct an independent analysis of his blood sample?
- C. Whether the [trial court] erred by failing to suppress the evidence of the Commonwealth's inspection of the vehicle where [Wickham]'s Fourteenth Amendment right to due process was violated because the Commonwealth failed to provide [Wickham] with the opportunity to conduct an independent inspection of the vehicle?

Wickham's Brief at 2.

We begin with Wickham's sufficiency of the evidence claim, which we review according to the following standard:

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility

of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

***Commonwealth v. Knox***, 50 A.3d 749, 754 (Pa. Super. 2012), *appeal granted on other grounds*, \_\_\_ Pa. \_\_\_, \_\_\_ A.3d \_\_\_, 2013 WL 2451355 (June 6, 2013).

Wickham challenges the sufficiency of the evidence to support his conviction of homicide by vehicle while driving under the influence.<sup>2</sup> Specifically, Wickham contends that the evidence was insufficient to prove that the victim's death was caused by Wickham driving under the influence of alcohol, suggesting the evidence established that the victim's death would have occurred regardless of his level of intoxication. Wickham's Brief at 9.

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<sup>2</sup> The crime is defined by statute as follows: "Any person who unintentionally causes the death of another person as the result of a violation of section 3802 (relating to driving under influence of alcohol or controlled substance) and who is convicted of violating section 3802 is guilty of a felony of the second degree when the violation is the cause of death and the sentencing court shall order the person to serve a minimum term of imprisonment of not less than three years. A consecutive three-year term of imprisonment shall be imposed for each victim whose death is the result of the violation of section 3802." 75 Pa.C.S.A. § 3735(a).

The trial court found that the evidence presented was sufficient for the jury to conclude that Wickham's driving under the influence of alcohol caused the victim's death. Trial Court Opinion, 2/19/13, at 7-13. We agree.

The record, when viewed in the light most favorable to the Commonwealth as our standard requires, reveals the following facts. In the late morning and early afternoon of March 7, 2011, Wickham drank three 24-ounce beers while performing snow removal duties at several properties. N.T., 9/11/12-9/14/12, at 513. The only thing he had to eat that day was half of a sandwich. *Id.* at 543-44. At approximately 5:30 p.m., he received a call from his employer that he needed to tow a car from the Social Security Administration building. *Id.* at 347.

When Wickham arrived at the Social Security Administration parking lot, a security guard identified the car for him and told him the car had no brakes. *Id.* at 33. Wickham then drove towards the disabled vehicle, and the victim told him that the vehicle had no brakes and that she wanted it to be towed to her residence.<sup>3</sup> *Id.* at 399. Wickham then entered the victim's vehicle, started the car, and with the driver's door open, put it into reverse

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<sup>3</sup> According to Officer Robert Kelly of the Plains Township Police Department, who interviewed Wickham the day after the incident, Wickham admitted that the victim told him her car had no brakes. N.T., 9/11/12-9/14/12, at 399. At trial, Wickham denied that he knew the car had no brakes until after the accident occurred. *Id.* at 525-26. The jury clearly found Wickham's testimony not to be credible on this point. As an appellate court, we will not disturb a jury's credibility determination. ***Commonwealth v. Wright***, 599 Pa. 270, 292, 961 A.2d 119, 131 (2008).

so that he could reposition the car to face the tow truck. **Id.** at 525-26. The victim was standing by the rear door on the driver's side, facing Wickham. **Id.** at 35, 37. The victim's car flew backwards, struck the victim with the open driver's side door, and she was thrown, hitting her head on the concrete. **Id.** at 35-37. Immediately after the accident, Wickham took two full cans of beer that he had in his tow truck and threw them over a snow bank in the parking lot, fearing he would "get blamed for this accident." **Id.** at 528.

When the police arrived, Officer William Poulos testified that he detected an odor of alcohol on Wickham's breath. **Id.** at 93. Wickham fumbled through his wallet upon Officer Poulos' request for identification, which the officer knew to be a sign of intoxication based on his training and experience. **Id.** at 87, 93. He transported Wickham to the hospital for a blood alcohol test, which revealed a blood alcohol content of 0.114%. **Id.** at 199. While in the better lighting conditions at the hospital, Officer Poulos further observed Wickham's eyes to be "glossy" and bloodshot. **Id.** at 96. Based upon his education, training and experience, Officer Poulos was of the opinion that Wickham was driving under the influence of alcohol and incapable of safely driving at the time of the incident in question. **Id.** at 102-03.

The Commonwealth's forensic toxicology expert testified that a 0.114% blood alcohol content would result, *inter alia*, in a loss of some

judgment, decrease in sensory response, slower information processing, and a likelihood of engaging in higher risk behavior than in a non-alcoholic state. ***Id.*** at 385.

According to the Commonwealth's automotive expert, the car could only have accelerated backwards if Wickham was pressing the gas pedal. ***Id.*** at 276. Wickham's automotive expert testified that, as an experienced tow truck driver (as was Wickham), if he knew a car had brake problems he would first test the emergency brake before ever putting it into gear. ***Id.*** at 494. After reviewing all of the reports, statements, and the physical evidence, the Commonwealth's accident reconstruction expert concluded that Wickham was operating the victim's car, failed to close the driver's side door, engaged the car in reverse and accelerated, striking the victim. ***Id.*** at 312-13.

Based upon the testimony presented at trial, the evidence sufficiently proved that Wickham driving under the influence of alcohol caused the victim's death. As such, no relief is due.

As his second issue on appeal, Wickham asserts that the trial court erred by denying his motion for discovery sanctions in the form of suppression of his blood alcohol test results, as the Commonwealth denied him the opportunity to independently test the blood sample, violating his Fourteenth Amendment Due Process rights. Wickham's Brief at 12. The trial court found that Wickham failed to support his argument with sufficient



evidence, and that established Pennsylvania case law required the denial of his request for suppression. Trial Court Opinion, 2/19/13, at 3-5.

We review a trial court's ruling on a request for discovery sanctions for abuse of discretion. ***Commonwealth v. Galloway***, 771 A.2d 65, 68 (Pa. Super. 2001). The relevant provisions of the discovery rule state:

**(B) Disclosure by the Commonwealth.**

(1) *Mandatory*. In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.

(a) Any evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth[.]

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**(E) Remedy.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

Pa.R.Crim.P 573(B)(1)(a), (E).

Counsel for Wickham did not claim that the blood sample was “within the possession or control of the attorney for the Commonwealth” as required by Rule 573(B)(1)(a). Nor did counsel for Wickham allege any bad faith on the part of the Commonwealth. N.T., 8/10/12, at 13. Rather, counsel for Wickham acknowledged that the hospital (not the Commonwealth) had destroyed the blood sample 90 days after the blood draw pursuant to its policy. *Id.* at 10, 12. As such, it cannot be found that the Commonwealth “failed to comply” with mandatory discovery, as Wickham claimed.

We note, however, that although Wickham titled his motion as a motion for discovery sanctions, his argument on this issue, both below and on appeal, is styled in the form of a motion to suppress evidence. Our review of the Commonwealth’s argument in opposition to his claim below and on appeal and the trial court’s disposition likewise address this issue as if it were in response to a motion to suppress as opposed to a motion for discovery sanctions. Treating it as a denial of a motion to suppress, however, still does not entitle Wickham to relief.<sup>4</sup>

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<sup>4</sup> “Generally, our standard of review when addressing a challenge to a trial court’s denial of suppression is whether the factual findings are supported by the record and whether the legal conclusions drawn from these facts are correct. When reviewing the rulings of a suppression court, we must consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the legal

The basis for Wickham's argument in favor of suppression is the destruction of his blood sample before he had the opportunity to conduct an independent test of the sample. Wickham presented no evidence in support of this claim, only an argument that the blood sample evidence was potentially exculpatory, based upon his belief that his diagnosis as an insulin-dependent diabetic could have affected the blood alcohol test results. N.T., 8/10/12, at 5, 11.

In ***Commonwealth v. Snyder***, 599 Pa. 656, 963 A.2d 396 (2009), our Supreme Court considered the ramifications when evidence "which is not materially exculpatory, but potentially useful, is destroyed before the defense has an opportunity to examine it." ***Id.*** at 665, 963 A.2d at 401. Pursuant to ***Snyder***, the blood sample in the case at bar is "potentially useful evidence," which it defined as "evidence 'of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant[.]'" ***Id.*** at 669, 963 A.2d at 403 (quoting ***Arizona v. Youngblood***, 488 U.S. 51, 57 (1988)).

The ***Snyder*** Court held that the Commonwealth's failure to preserve potentially useful evidence does not violate the defendant's Due Process rights absent a showing that the Commonwealth acted in bad faith. ***Id.*** at 666-72, 963 A.2d at 402-06. The ***Snyder*** Court relied in part upon United  

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conclusions drawn therefrom are in error." ***Commonwealth v. Harvard***, 64 A.3d 690, 695 (Pa. Super. 2013) (citation omitted).

States Supreme Court precedent finding no Due Process violation where the prosecution disposed of breathalyzer samples before DUI defendants could examine them. *Id.* at 665-66, 963 A.2d at 401-02 (citing ***California v. Trombetta***, 467 U.S. 479 (1984)).

At the hearing on the motion, counsel for Wickham expressly stated they were “not alleging any bad faith on the part of the Commonwealth.” N.T., 8/10/12, at 13. As the ***Snyder*** Court found a finding of bad faith on the part of the Commonwealth to be a necessary prerequisite for suppression of potentially useful evidence on this basis, Wickham’s claim fails.

As his final issue on appeal, Wickham argues that the trial court erred by failing to suppress evidence related to the Commonwealth’s inspection of the victim’s vehicle, as the Commonwealth did not provide him with the opportunity to conduct his own examination of the car, thus violating his Fourteenth Amendment Due Process rights. Wickham’s Brief at 14-18. He states that the Commonwealth’s failure to provide him with an opportunity to examine the vehicle constitutes a ***Brady***<sup>5</sup> violation. *Id.* at 15-17. The trial court found that Wickham “failed to produce any evidence at the August 10, 2012 hearing to remotely suggest the Commonwealth suppressed exculpatory evidence.” Trial Court Opinion, 2/19/13, at 14. It further found

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<sup>5</sup> ***Brady v. Maryland***, 373 U.S. 83 (1963).

that “[t]he record is devoid of any evidence that [Wickham] was prevented access to the vehicle prior to trial,” or that counsel sought to secure an inspection of the vehicle where it was located. *Id.* at 13-14. It thus concluded that the claim was meritless, and the Commonwealth was not subject to discovery sanctions. Once again, our standard of review is abuse of discretion. *Galloway*, 771 A.2d at 68.

In *Brady v. Maryland*, the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87. This holding has been adopted by our Supreme Court, which set forth the standards for establishing a *Brady* violation as follows: “[A] defendant must show that: (1) the evidence was suppressed by the state, either willfully or inadvertently; (2) the evidence at issue is favorable to the defendant; and (3) the evidence was material, meaning that prejudice must have ensued.” *Commonwealth v. McGill*, 574 Pa. 574, 583, 832 A.2d 1014, 1019 (2003) (citations omitted).

The burden rests with Appellant to prove, by reference to the record, that evidence was withheld or suppressed by the prosecution. There is no *Brady* violation when the appellant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from non-governmental sources. *Brady* does not require the disclosure of information that is not exculpatory but might merely

form the groundwork for possible arguments or defenses.

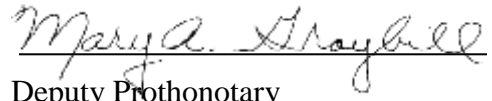
***Commonwealth v. Chamberlain***, 612 Pa. 107, 155, 30 A.3d 381, 409 (2011) (internal citations and quotations omitted).

As noted above, despite the trial court's invitation, counsel Wickham presented no evidence at the hearing on the motion for discovery sanctions. Wickham does not assert, either in his motion for sanctions or his brief on appeal, that he was unable to locate the vehicle for inspection. To the contrary, the record reflects that the Commonwealth directly informed counsel where the vehicle could be found several months prior to trial. N.T., 4/2/12, at 3; N.T., 8/10/12, at 9; Commonwealth's Response to Defendant's Motion for Compulsory Disclosure, 8/1/12, at ¶5. Furthermore, counsel for Wickham's sole argument with respect to the vehicle before the trial court was the "contention that the idle was set high on this particular vehicle, which, in fact, contributed to the accident, along with the lack of brakes." N.T., 8/10/12, at 5. This does not support a finding that the vehicle was in fact exculpatory, only that an independent inspection of the vehicle might reveal information that would permit the advancement of an additional defense. For these multiple reasons, the trial court correctly found that Wickham failed to establish a ***Brady*** violation such that sanctions were warranted.

Judgment of sentence affirmed.

J-S42014-13

Judgment Entered.

A handwritten signature in cursive script that reads "Mary A. Graybill". The signature is written in black ink and is positioned above a horizontal line.

Deputy Prothonotary

Date: 8/13/2013