NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
CHE ISAAC UNDERWOOD,	:	
	:	No. 247 MDA 2012
Appellant	:	

Appeal from the Judgment of Sentence December 20, 2011
In the Court of Common Pleas of York County
Criminal Division No(s).: CP-67-CR-0001979-2010

BEFORE: OLSON, OTT, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: February 1, 2013

Appellant, Che Isaac Underwood, appeals from the judgment of sentence entered in the York County Court of Common Pleas. He argues that his rights under the confrontation clause were violated because the Commonwealth did not call the technician who physically performed the blood test and there was no probable cause for his arrest. We affirm.

The trial court summarized the facts and procedural posture of this case as follows:

> On January 24, 2010, [Appellant] was pulled over by Officer Scott George for driving a vehicle that was displaying an expired registration tag. Upon approaching the vehicle and smelling a strong odor of alcohol, Officer

* Former Justice specially assigned to the Superior Court.

> George questioned [Appellant] and [Appellant] admitted to drinking one glass of wine two hours earlier. [Appellant] then agreed to submit to a Portable Breath Test (PBT), followed by Standardized Field Sobriety Testing (SFST). Based on Officer George's observations of [Appellant, his] admission to the recent consumption of alcohol, the PBT result, and the failure of the SFSTs, [he] was arrested for Driving Under the Influence. After [Appellant's] arrest, Officer George transported [Appellant] to Memorial Hospital for a blood draw . . . . [Appellant's] blood was then sent to NMS Labs for testing. Dr. Edward Barbieri, a forensic toxicologist, issued a lab report detailing the results of the blood tests; [Appellant] was reported to have had a blood alcohol content (BAC) of .113 on the night in question.
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> [Appellant] was officially charged with four counts of Driving Under the Influence, 75 Pa. Cons. Stat. Ann. §§ 3802(a)(1), 3802(b), 3802(d)(3), and 3802(d)(1)(ii). On May 28, 2010, [Appellant] filed a Pre-Trial Omnibus Motion to Suppress. At the conclusion of a hearing on July 19, 2010, this Court Denied [Appellant's] Motion. Then, following the Commonwealth's withdrawal of Counts Three and Four,[1] a Non-Jury Trial was scheduled for March 31, 2011. At that time, the Commonwealth sought to introduce evidence of [Appellant's] BAC via the lab report, accompanied by the testimony of Dr. Barbieri. [Appellant] objected to the introduction of this evidence, arguing that it violated [Appellant's] 6th Amendment right to Confrontation. This Court overruled his objections at the time and proceeded to hear all testimony. When both sides had rested, [Appellant] renewed his objection and made a Motion for Judgment of Acquittal. The Court then allowed both parties to submit briefs on their respective positions and considered those before Denying [Appellant's] Motion on August 12, 2011.
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> The Court then rendered a verdict on September 30, 2011, finding [Appellant] Guilty of both counts One and Two, Driving Under the Influence. On December 20, 2011,

[1] The Commonwealth withdrew the charges under sections 3802(d)(3) and 3802(d)(1)(ii).

> this Court Sentenced [Appellant] to six months of Intermediate Punishment on Count Two, consisting of 15 days in York County Prison, 30 days on house arrest, and the balance on probation supervision; [Appellant] was also ordered to pay a $750 fine and Court costs in addition to the standard DUI sentencing conditions. Count One merged for Sentencing purposes. [Appellant] then filed a Post-Sentence Motion on December 20, 2011, which this court denied on January 5, 2012.

Trial Ct. Op., 3/8/12, at 1-3 (citations omitted).

This timely appeal followed. Appellant filed a timely court-ordered Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal and the trial court filed a responsive opinion.

Appellant raises the following issues on appeal:

> 1. The United State[s] Constitution as well as the Pennsylvania Constitution necessitates that a defendant has an absolute right to confront any witness at trial who is offering "testimony" against him. Where the Commonwealth failed to call the individual who physically performed a blood analysis of Appellant's blood, should the Appellant's conviction be vacated?
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> > A. When the Commonwealth called a forensic toxicologist who rendered an expert opinion to [Appellant's] blood alcohol content, but who had nothing to do with [Appellant's] actual blood alcohol analysis, was [Appellant's] right to confrontation violated?
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> > B. Whether the recent United States Supreme case in ***Melendez-Diaz v. Massachusetts***[, 557 U.S. 305 (2009),] and ***Commonwealth v. Barton-Martin***, [5 A.3d 363 (Pa. Super. 2010),] required the Commonwealth to call someone other than Dr. Edward J. Barbieri as a witness to introduce the Appellant's blood alcohol content, as Dr. Barbieri was not the analyst who conducted the blood alcohol testing of Appellant.

> C. The rules of evidence must give way to the Confrontation Clause. It is irrelevant that Dr. Barbieri was qualified as an expert in forensic toxicology, it is still an essential part of the Commonwealth's case to call the actual analyst who tested [Appellant's] blood.
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> D. Whether the trial court properly held that [Appellant's] right to confrontation was not violated because the Commonwealth established the methodology and reliability of the testing procedures used by NMS Labs and [Appellant] did not allege any specific errors in the testing process?
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> 2. An arrest must be supported by probable cause. Where taking a totality of the circumstances approach, would a reasonable, prudent person believe that [Appellant] was engaging in wrongful conduct and was the trial court's finding of probable cause an abuse of discretion?

Appellant's Brief at 1-2.[2]

First, Appellant argues the court erred in admitting the results of his blood alcohol analysis because the Commonwealth failed to call the individual who physically performed the blood analysis. ***Id.*** at 26. Appellant

[2] We note that Appellant's post-sentence motion is not in the certified record on appeal, although it is in the reproduced record. "[I]f a document is not in the certified record, the Superior Court may not consider it." ***Commonwealth v. Preston***, 904 A.2d 1, 6 (Pa. Super. 2006). Nevertheless, the absence of the post-sentence motion is of no moment. "Issues raised before or during trial shall be deemed preserved for appeal whether or not the defendant elects to file a post-sentence motion on those issues." Pa.R.Crim.P. 720(B)(1)(c). Appellant preserved the first issue in an oral motion for judgment of acquittal at the close of the Commonwealth's case in chief. N.T., 3/31/11, at 99. Appellant preserved his second claim on appeal, that the officer lacked probable cause to arrest, in an omnibus pretrial motion. ***See*** Omnibus Pretrial Motion, 5/28/10.

contends that the admission of the evidence was a violation of his rights under the confrontation clause of the Sixth Amendment of the United States Constitution pursuant to the United States Supreme Court's decision in ***Melendez–Diaz***, ***supra***. ***Id.*** at 27.

The brief states:

> Appellant concedes that the facts of the present matter are identical to those of ***Commonwealth v. Yohe***, [39 A.3d 381 (Pa. Super. 2012), *appeal granted*, 2012 Pa. LEXIS 1987[3]]. Additionally undersigned counsel was the attorney of record for Yohe at trial and through the appeal to the Superior Court and is employed with the firm responsible for filing a petition for allowance of appeal with the Supreme Court of Pennsylvania. Appellant wishes to preserve the issue for potential consideration following the disposition of the ***Yohe*** case.

Id. at 45-46.

The issue of "[w]hether [the defendant] was denied [his] right to confront a witness under the confrontation clause of the Sixth Amendment is a question of law for which our standard of review is *de novo* and our scope of review is plenary." ***Yohe***, 39 A.3d at 384 (citation omitted).

This Court in ***Yohe*** addressed the issue of "whether the Confrontation Clause is satisfied by the testimony of a witness who certifies blood-alcohol test results and signs the report of those results but did not observe,

[3] Allowance of appeal was granted in ***Yohe***, and the issue before the Supreme Court is "[w]hether the Commonwealth's decision not to call the individual who physically performed a blood analysis of [p]etitioner's blood violated [p]etitioner's rights under the Confrontation Clause." ***Yohe***, 2012 Pa. LEXIS 1987.

prepare or conduct the actual testing procedures." ***Id.*** at 388. In ***Yohe***, the defendant's "blood sample was sent to NMS labs for analysis. [A] forensic toxicologist at NMS Labs [testified that] he performs case assignments, case evaluations, reviews of analytic testing, writing of reports, and court testimony." ***Id.*** at 387.

This Court in ***Yohe*** distinguished ***Commonwealth v. Barton–Martin***, 5 A.3d 363 (Pa. Super. 2010), *appeal denied*, 30 A.3d 486 (Pa. 2011) and ***Bullcoming v. New Mexico***, ___ U.S. ___, 131 S.Ct. 2705, (2011). We stated: "The ***Barton–Martin*** Court noted that a mere **custodian of records, otherwise unconnected to the performance of the analysis of the blood sample at issue**, does not satisfy the confrontation clause." ***Yohe***, 39 A.3d at 386 (emphasis added).

> In ***Bullcoming***, the defendant was charged with driving while intoxicated. At trial, a forensic laboratory report of the defendant's blood-alcohol level, as analyzed and prepared by the New Mexico Department of Health, Scientific Laboratory Division (SLD), was offered into evidence. The report was completed, signed and certified by an analyst **who was not called to testify**. Instead, another analyst from SLD testified as to the procedures and equipment used but admitted he had no involvement with the specific sample at issue. The Supreme Court recognized "[a]n analyst's certification prepared in connection with a criminal investigation or prosecution . . . is 'testimonial,' and therefore within the compass of the Confrontation Clause."

Id. (citations omitted and emphasis added). This Court in ***Yohe*** opined:

> Instantly, it is clear that [the forensic toxicologist] did not handle [the defendant's] blood sample, prepare portions for testing, place the prepared portions in the

> testing machines, or retrieve the portions after testing. However, it is equally clear that [the toxicologist] did review the entire file, compare the results of the three independent test printouts on the three aliquots, certify the accuracy of the results, and sign the report. Accordingly, [the toxicologist] is the analyst who prepared the certificate in anticipation for use at [the defendant's] trial. We concede that [the toxicologist] is in a similar position as the testifying witnesses in ***Barton–Martin*** and ***Bullcoming*** in that he did not personally handle the defendant's blood sample, prepare the aliquots, or physically place the aliquots in the testing apparatuses. However, unlike the testifying witnesses in ***Barton–Martin*** and ***Bullcoming***, [the toxicologist] did certify the results of the testing and author the report sought to be admitted as evidence against [the defendant]. We conclude this distinction is dispositive of the issue presented.
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> As declared in ***Bullcoming***, it is the certification and the written report that constitute the "testimonial statement" triggering the Sixth Amendment right of confrontation. [The defendant] is not limited in his cross-examination of [the toxicologist] as suggested by the trial court simply because there may be questions he cannot answer due to the fact he did not perform a specific task in the course of processing [the defendant's] blood sample. What is relevant to [the defendant's] right of confrontation is the basis for the findings in the report and the certification of those results. [The toxicologist], as the certifying analyst and signatory to the report, is the person who can respond to questions about the reasons for his certification and the bases for the factual assertions in the report. The fact that NMS Labs chose not to have the individual who physically performed the testing certify the results and author the report may be an issue relevant to the weight of the certification, but it is not a confrontation issue. This is true so long as [the toxicologist's] certification is based on a true analysis and not merely a parroting of a prior analysis supplied by another individual. Here [the toxicologist] reviewed the raw data from the analysis machines, compared the three BAC results, and verified the correctness of the procedures as logged by the technicians. Based on his analysis of these materials, [the

> toxicologist] certified the results as reflected in the report he signed.

Id. at 389-90 (footnote and citations omitted).

Analogously, in the instant case, Dr. Barbieri testified in his capacity as the forensic toxicologist who reviewed the data, made the final calculations and issued the report.

The trial court opined:

> After reviewing the testimony of Dr. Barbieri, the Commonwealth's expert witness and the forensic toxicologist who issued the report detailing the results of [Appellant's] blood test, this Court determined that he was the witness against [Appellant] whom [Appellant] had a constitutional right to confront. The forensic toxicologist does the same thing that the lab technicians do—he reviews the same graphs and numbers and compares results of the sample with those of the controls to ensure test accuracy. The forensic toxicologist, however, goes a step farther by actually calculating the BAC and signing the report to verify that the BAC reported is correct. Although the forensic toxicologist never physically handles the specimen, it is he who provides the evidence against [Appellant]—here, in the form of a BAC. It is the forensic toxicologist who provides the final check on the raw data results, ensuring that they were correctly entered into the computer by the lab techs, and it is the forensic toxicologist who makes the final calculations and issues the report. As there is no BAC level assigned to a specimen until it gets to the forensic toxicologist, he is the person responsible for the evidence admitted against [Appellant] at trial.
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> . . . The case most akin to [Appellant's] is a previous case handled by this Court—***Commonwealth v. Yohe***. . . . As the situation in [Appellant's] case mirrors that in ***Yohe***, Dr. Barbieri was the witness [Appellant] was entitled to confront. . . .

Trial Ct. Op. at 5-6 (unpaginated). We agree that no relief is due. ***See Yohe***, ***supra***.

Lastly, Appellant argues that there was no probable cause to arrest him based upon the totality of the circumstances. Appellant's Brief at 46. Appellant contends the trial court's finding of probable cause to arrest was an abuse of discretion.[4] Appellant avers "[t]he evidence produced by the Commonwealth only established that [he] had merely consumed alcohol and then drove. Neither of which, without more, is a crime. Further, Officer George never made a specific finding or determination that the driver was incapable of safely operating his motor vehicle." ***Id.*** at 49.

> Our standard for reviewing an order denying a motion to suppress is as follows:
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> > We are limited to determining whether the lower court's factual findings are supported by the record and whether the legal conclusions drawn therefrom are correct. We may consider the evidence of the witnesses offered by the Commonwealth, as verdict winner, and only so much of the evidence presented by defense that is not contradicted when examined in the context of the record as a whole. We are bound by facts supported by the record and may

[4] We note Appellant's Pa.R.A.P. 1925(b) statement raises the issue of probable cause to arrest, not the issue of whether there was reasonable suspicion for the underlying motor vehicle stop. ***See*** Appellant's Pa.R.A.P. 1925(b), 2/7/12, at 2. The trial court addressed the issue of whether the officer lacked probable cause to stop Appellant and concluded that only reasonable suspicion was required for the vehicle stop. Trial Ct. Op. at 3-4 (unpaginated). "We may affirm the trial court on any ground." ***Commonwealth v. Lynch***, 820 A.2d 728, 730 n.3 (Pa. Super. 2003).

> reverse only if the legal conclusions reached by the court were erroneous.

Commonwealth v. Hilliar, 943 A.2d 984, 989 (Pa. Super. 2008) (citation omitted).

This Court has explained "Probable cause exists where the officer has knowledge of sufficient facts and circumstances to warrant a prudent person to believe that the driver has been driving under the influence of alcohol or a controlled substance." ***Hilliar***, 943 A.2d at 994 (citation omitted). Furthermore, "it is the ensuing interaction between the officer and the driver that yields the information that gives rise to probable cause of a DUI violation . . . ." ***Id.*** at 991.

Instantly, Officer George testified that when he stopped Appellant for the expired registration, "[t]here was a strong odor of an intoxicating alcoholic beverage inside of the car, and he was the only person in the car." N.T., 3/31/11, at 9. Appellant's "pupils were actually constricted, which immediately is an indicator to me that there is a presence of narcotic because it is the only drug category that constricts your pupils." ***Id.*** at 12. Appellant claimed to have an injured right ankle. ***Id.*** at 13. Appellant agreed to submit to a field sobriety test. ***Id.*** Appellant was asked to perform the one-leg stand. ***Id.***

Appellant avers that "Officer George never made a specific finding or determination that [Appellant] was incapable of safely operating his motor

vehicle." Appellant's Brief at 49. A review of the record belies this assertion. Officer George testified:

> [The Commonwealth]: . . . And based on [Appellant's] performance on those tests and the PBT that you instructed [Appellant] to take, did you make a conclusion as to whether or not [Appellant] could operate a motor vehicle safely?
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> A: No. I believed he was impaired.
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> Q: And at that time did you take [Appellant] into custody?
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> A: I did. He was arrested for DUI and asked to submit to a chemical test.

N.T. at 14.

Officer George smelled a strong odor of alcohol when he approached the vehicle. Appellant's eyes were constricted. Appellant performed poorly on the field sobriety test. Based upon these factors and the PBT test, Officer George concluded that Appellant could not safely operate a motor vehicle.

Viewing the totality of the circumstances in the case *sub judice*, we agree with the trial court that there was probable cause to arrest Appellant. We discern no error by the trial court. ***See Hilliar*, *supra***.

Judgment of sentence affirmed.