NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
WILLIAM THOMAS BROWN,	:	
	:	
Appellant	:	No. 709 EDA 2013

Appeal from the Judgment of Sentence September 27, 2012
In the Court of Common Pleas of Northampton County
Criminal Division No(s).: CP-48-CR-0001207-2012

BEFORE: BOWES, PANELLA, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED DECEMBER 23, 2013**

Appellant, William Thomas Brown, appeals from the judgment of sentence[1] entered in the Northampton County Court of Common Pleas. He argues that the evidence for his jury conviction for driving under the influence ("DUI"), highest rate,[2] was insufficient because his rights under the

* Former Justice specially assigned to the Superior Court.

[1] Although Appellant purports to "appeal from verdict of jury trial" and the February 5, 2013 order denying his post-sentence motion, the appeal properly lies from the judgment of sentence. We have corrected the caption accordingly. ***See Commonwealth v. Shamberger***, 788 A.2d 408, 410 n.2 (Pa. Super. 2001) (*en banc*) (stating that in criminal action, appeal properly lies from judgment of sentence made final by denial of post-sentence motions).

[2] 75 Pa.C.S. § 3802(c).

Confrontation Clause were violated because the Commonwealth did not call the technician who performed the blood test. He also contends his conviction for DUI, general impairment,[3] was against the weight of the evidence.[4] We affirm.

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

> [Appellant] was operating his vehicle [when] he became involved in a one car accident, losing control of his vehicle, leaving the roadway and striking a wall. A friend was following [Appellant] and called 911. The police responded to the scene shortly after the accident occurred. The police found [Appellant] conscious, with his friend outside the damaged vehicle. The police interviewed [Appellant]. He was unable to relay what happened and, further, appeared to be under the influence of alcohol. He evidenced an odor of alcohol, had bloodshot/glassy eyes and appeared to be unsteady. [Appellant] was taken to the hospital where a sample of his blood was taken at 11:38 P.M., which was later analyzed at the Health Network Laboratories. The BAC result was a 0.22% blood alcohol level.

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[3] 75 Pa.C.S. 3802(a)(1). We note that the docket indicates that this charge was withdrawn. ***See*** Docket at 2. However, the jury found Appellant guilty of DUI, general impairment. ***See*** Verdict Slip, 9/11/12, at 1.

[4] We note that the certified record forwarded to this Court did not include the September 10-11, 2012, trial transcript, which is necessary for our review of Appellant's issues. However, upon informal inquiry by this Court, the trial court provided the transcript as a supplemental record. Although Appellant included the trial transcripts in his reproduced record, "for purposes of appellate review, what is not in the certified record does not exist." ***See Ruspi v. Glatz***, 69 A.3d 680, 691 (Pa. Super. 2013). We remind counsel that the appellant bears the burden of ensuring the certified record is complete for appellate review. ***See Commonwealth v. Andre***, 17 A.3d 951, 959 n.8 (Pa. Super. 2010).

> [At trial d]efense counsel rigorously cross-examined the director of the Health Network Laboratory [("HNL")] regarding the blood alcohol test results as it related to the chain of custody, the science of gas chromatography, testing protocol of her laboratory and the test result related to [Appellant's] sample. . . .
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> * * *
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> After the jury trial, a guilty verdict was returned on September 11, 2012, finding [Appellant] guilty of Driving after Imbibing with a high blood alcohol level of 0.22%.[5] It was [Appellant's] third DUI conviction within a seven year period. . . . [W]e imposed a 12 month to 60 month sentence . . . . As to the length of sentence, we imposed only the mandatorily required minimum sentence.
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> Defense Counsel filed Post-Sentence Motions on October 8, 2012 . . . .
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> * * *
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> [Appellant] filed a *pro se* Motion for Reconsideration of Sentence on October 11, 2012. [Appellant's] *pro se* Motion was untimely. We wrote counsel informing him that we would not consider the *pro se* motion, as we will not recognize hybrid representation.
>
> Defense Counsel filed a separate Post-Sentence Motion for reconsideration on October 25, 2012, which attached the *pro se* Motion of October 11, 2012. We accepted Counsel's filing as a timely Petition to Amend a Post-Sentence Motion to include reconsideration of sentence.

Trial Ct. Op., 2/5/13, at 1-3. The trial court denied Appellant's post-sentence motion. This timely appeal followed. Appellant filed a court-

[5] Appellant was also found guilty of careless driving and fined $25.00. ***See*** 75 Pa.C.S. § 3714(a).

ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal.[6] The trial court's Pa.R.A.P. 1925(a) opinion incorporated its February 5, 2013 opinion denying Appellant's post-sentence motion.

Appellant raises the following issues for our review:

> I. Whether Appellant's conviction for DUI, Highest Rate, was unsupported by sufficient evidence because Appellant's Right to Confrontation under the United States Constitution was violated because the Commonwealth failed to call the actual analyst that performed Appellant's blood alcohol test and did not offer an expert witness to establish the results of Appellant's blood alcohol test.
>
> II. Whether Appellant's conviction for DUI, Highest Rate, was unsupported by sufficient evidence because Appellant's Right to Confrontation under the Pennsylvania Constitution was violated because the Commonwealth failed to call the actual analyst that performed Appellant's blood alcohol test and did not offer an expert witness to establish the results of Appellant's blood alcohol test.
>
> III. Whether the Trial Court's finding of guilt as to DUI, General Impairment, was against the weight of the evidence because the Commonwealth failed to offer into evidence the findings upon which [Joanne] Sell[7] rendered her opinion with regard to Appellant's blood alcohol content.

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[6] On March 4, 2013, the court ordered Appellant to file a Rule 1925(b) statement within twenty-one days thereafter, on Monday, March 25th. Order, 3/4/13, at 1. Appellant's counsel filed a Rule 1925(b) statement on March 26, 2013. The trial court addressed the issues raised on appeal in its February 5, 2013, opinion. ***See Commonwealth v. Thompson***, 39 A.3d 335, 341 n.11 (Pa. Super. 2012) (remand not necessary where trial court addressed issues in untimely Rule 1925(b)).

[7] Ms. Sell is the manager of toxicology and referral testing for HNL. N.T., 9/10/12, at 22.

Appellant's Brief at 5.

Appellant addresses his first two issues together. He avers "the analysis for a violation of the Pennsylvania Constitution's Confrontation Clause is identical to the analysis for a violation of the Constitution of the United States." ***Id.*** at 21. Appellant argues that the trial court erred by allowing Ms. Sell to testify regarding the results of his blood alcohol tests, which were conducted by analysts who were not present at trial. ***Id.*** at 12. He contends that because the blood tests results were testimonial evidence, his rights under the Confrontation Clauses of the Unites States Constitution and the Pennsylvania Constitution were violated. Appellant avers that "Ms. Sell did not provide a true analysis of the results" of the blood test, and therefore, the case at bar is distinguishable from this Court's opinion in ***Commonwealth v. Yohe***, 39 A.3d 381 (Pa. Super. 2012), *aff'd*, ___ A.3d ___, 2013 WL 5826045 (Pa. Oct 30, 2013).[8] ***Id.*** at 14. Furthermore, citing ***Bullcoming v. New Mexico***, 131 S. Ct. 2705 (2011), he claims that the documentation is not "pure raw analytical data, free from the influence of the individuals who actually performed the testing." ***Id.*** Appellant claims he had "a Right to Confront the analysts who actually analyzed his sample . . . ." ***Id.*** at 20.

[8] As we discuss *infra*, subsequent to the filing of Appellant's appellate brief, our Supreme Court affirmed our decision in a published opinion, ***Yohe***, 2013 WL 5826045.

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, prepare or conduct the actual testing procedures." ***Id.*** at 388. In ***Yohe***, [a] forensic toxicologist [testified that] he performs case assignments, case evaluations, reviews of analytic testing, writing of reports, and court testimony." ***Id.*** at 387.

Yohe distinguished ***Commonwealth v. Barton–Martin***, 5 A.3d 363 (Pa. Super. 2010), *appeal denied*, 30 A.3d 486 (Pa. 2011) and ***Bullcoming*** 131 S.Ct. 2705. 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). We also summarized:

> 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).

The Pennsylvania Supreme Court, in affirming this Court, opined

> [The toxicologist] is the analyst who determined [the defendant's] BAC. Although he relied on the raw data produced by the lab technicians and utilized this raw data in reaching an expert opinion premised on his evaluation of the case file, he is the only individual who engaged in the critical comparative analysis of the results of the gas chromatograph tests and the enzymatic assay and determined [the defendant's] BAC. [The toxicologist] was at the top of the inferential chain, and utilized the data that preceded his analysis in reaching his conclusion. He reached the conclusion in the Toxicology Report based on his analysis of the raw data, certified the results, and signed his name to them. As lab supervisor, moreover, [the toxicologist] was generally familiar with standard procedures and able to identify any deviations from this procedure or any problems with the particular lab technician. Accordingly, [he] evaluated and validated the entire record, decided which number to report as [the defendant's] blood alcohol content, and signed his name to the report. He was, therefore the certifying analyst who authored the Toxicology Report, and the analyst whom [the defendant] had a right to confront.

Yohe, 2013 WL 5826045 at *17.

In the instant case, Sell testified in her capacity as the forensic toxicologist who reviewed the data, made final calculations, and certified the report. She is certified by the American Society of Clinical Pathologists as a medical technologist and a specialist in chemistry. N.T., 9/10/12, at 22. She has a specialty certification in toxicology from the National Registry of Clinical Chemists. ***Id.*** at 23. She testified, *inter alia*, as follows:

> [The Commonwealth]: [W]hat is the standard procedure for your approved laboratory[9] when a sample comes in?
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> * * *
>
> [Ms. Sell]: When you do forensic analysis, whether it be for alcohol or drug testing, generally you want to do a second methodology or a different procedure to make sure that you are truly getting the correct answer . . . .
>
> For alcohol analysis, we start with a gas chromatography by one analyst, and then the samples are reanalyzed by a separate analyst by a different methodology which we use an enzymatic procedure for the second analysis.
>
> Q: As a result of those two independent tests by two independent . . . scientists . . . you then get a result?
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> A: Yes.
>
> Q: . . . There's a standard procedure for your certified lab?
>
> A: Yes.
>
> Q: And you oversee that, correct?

[9] HNL is certified and approved by the commonwealth of Pennsylvania and accredited by the College of American Pathologists. N.T. at 24.

A: Yes.

Q: . . . In this particular case, are you familiar with the records?

A: Yes. . . .

Q: . . . I'm going to show you what's been marked as C-1 and C-2. Were they of any significance to you?

A: These are documents from Saint Like's Hospital. They are requests for blood alcohol; it's to be drawn, and basically chain of custody or chain of possession. Whenever you do forensic analysis, you have what we call a chain of custody, which is a document that is prepared at the time the blood sample or urine samples [sic] is collected. And it is completed by the person collecting the sample.

The samples are put into sealed bags with evidence tape and transported to the laboratory or pickup station by either the law enforcement or coroners, whatever, and then when the bag is opened and the evidence is received in the toxicology laboratory, it's documented who received the sample.

And anybody who touches that sample throughout the testing process has to sign a document that shows who touched the sample and what was done with that sample.

* * *

Q: . . . Tell me about your role in the lab and those people that work for you.

A: Well, I am the manager. I'm also what we call the certifying scientist. . . .

Certifying scientists take all of the data for both the screening or initial testing as well as the secondary testing, looks at all of the data and then signs off on the reports after they have reviewed all of the data to make sure that

everything was done according to standard operating procedure.

The internal chain of custody is really a document that is prepared in the regular course of business as we perform the testing, and it includes other signatures. I'm familiar with the staff who does the testing. I'm familiar with their training; that they have been . . . adequately trained. . . . We keep very close records of all of our testing . . . .

* * *

Q: . . . As certifying scientist, are you responsible to see that the standard protocols or procedures are followed to the letter?

A: Yes, because the instruments' printout are part of the data packet where we can see all of the calibrators, what the calibrators read, that the quality control [QC] products were run, and the data for the QC instrument, make sure the QC was in line. And in this particular instance, the secondary methods that were done, that documentation is also present.

* * *

Q: . . . What was done in this case?

A: The data packet, we indicated that Jennifer Gilman, who is a second-shift toxicologist, removed the samples from secured storage. There are a total of about 15 samples that were run by gas chromatography in this batch. . . .

. . . She set up the analysis documents to indicate that she did the proper calibration; the calibration curve meets our requirements and specifications.

The [QC] products, these are samples that we buy from a third-party vendor that have known ranges. . . . The [QC] is a purchased set of values of what we need to get to make sure that the calibration was accurate.

> So that was done. And Kyle Smith, who is another toxicologist, [performed] the enzymatic analysis. And that data is also here, and it shows that the same samples were tested and correlated with the gas chromatograph results.
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> Q: What do you mean correlated with the gas chromatograph?
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> A: They matched.
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> * * *
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> Q: What did they match? What do they show?
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> A: It showed that the blood alcohol for [Appellant] was a .22 percent ethanol.
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> * * *
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> [Counsel for Appellant]: You would agree that proper protocols are to be followed, correct?
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> A: It's my professional opinion that proper protocols were followed both in the collection of the sample as well as the testing of the sample.

Id. at 25, 26-28, 31, 32, 34-36, 49-50.

The trial court opined:

> At trial, Ms. Sell was available to be cross-examined with regard to the chain of custody, the procedure required to be followed by her lab technicians when analyzing blood samples, the scientific theory supporting gas chromatography, the specific machine (gas chromatographer) utilized for testing [Appellant's] sample, the process by which the gas chromatographer was calibrated and the process by which [Appellant's] sample was analyzed. Ms. Sell was available for rigorous cross-examination by defense counsel, who attempted to attack aspects of the science related to gas chromatography, the testing protocol and the specific results related to

> [Appellant's] sample. [Appellant] had the unfettered ability to attack the lab results.
>
> Prior to Ms. Sell's testimony, defense counsel raised a standing objection to [her] testimony, asserting that [she] was incompetent to testify with regard to the lab results as she did not specifically conduct the analysis. We overruled the defense objections.
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> * * *
>
> The ***Yohe*** Court specifically held that ***Melendez-Diaz*** was not controlling because the testimony of the Assistant Lab Director who certified the testing results addressed the Confrontation clause.
>
> ***Yohe*** is directly on point. . . .

Trial Ct. Op. at 5, 6-7. We agree no relief is due. ***See Yohe***, 39 A.3d at 389-90.

Lastly, Appellant contends the trial court's finding of guilt as to DUI, general impairment, was against the weight of the evidence because Ms. Sell's testimony was not based upon personal observations. We find this challenge to the weight of the evidence waived for failure to develop an argument.

The Pennsylvania Supreme Court has stated:

> [W]here an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived. ***See also*** Pa.R.A.P. 2119(a) (each point treated in an argument must be "followed by such discussion and citation of authorities as are deemed pertinent"). It is not the obligation of this Court, even in a capital case, to formulate Appellant's arguments for him.

Commonwealth v. Johnson, 985 A.2d 915, 924 (Pa. 2009) (some citations omitted).

In the case ***sub judice***, the only legal authority presented concerning the weight of the evidence claim is a citation to the statute for DUI, general impairment. ***See*** Appellant's Brief at 21. Appellant fails to develop an argument, with citation to and analysis of legal authority, that the finding of guilt for his conviction of DUI, general impairment, was against the weight of the evidence. Therefore, the weight of the evidence claim is waived. ***See Johnson***, 985 A.2d at 924.

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/23/2013