NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. REGINALD TERREL FOSTER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 711 EDA 2013

Appeal from the Judgment of Sentence entered February 26, 2013,
in the Court of Common Pleas of Philadelphia County,
Criminal Division, at No(s): CP-51-CR-0009100-2012.

BEFORE: SHOGAN, ALLEN, and OTT, JJ.

MEMORANDUM BY ALLEN, J.: **FILED APRIL 15, 2014**

Reginald Terrel Foster ("Appellant") appeals from the judgment of sentence imposed after he was convicted of two counts of driving under the influence ("DUI").[1] We affirm.

The trial court summarized the pertinent facts as follows:

> On August 4, 2011, at approximately 8:48 P.M., Philadelphia Police Officer Richard Washington ("Officer Washington") and partner, Officer [Donyule] Williams ("Officer Williams"), came into contact with Appellant driving his car on North 54th Street in Philadelphia. Appellant passed the [officers], in their marked patrol car, at a high rate of speed. Both Appellant and [Officers] Washington and Williams continued traveling southbound on 54th Street. Upon seeing Appellant's car swerve as [he] attempted to avoid hitting a child on a bicycle riding down

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[1] 75 Pa.C.S.A. §§ 3802(a)(1) and (c).

> the street, [Officers] Washington and Williams activated their patrol lights to initiate a stop.
>
> Appellant pulled over and when [Officer] Washington approached Appellant in the driver's seat, he noticed that Appellant had bloodshot watery eyes and smelled alcohol on his breath. [Officer] Washington asked for the required paperwork and [Officer] Washington noticed that Appellant's speech was slurred and he was having difficulty retrieving the necessary paperwork. Appellant was then arrested based on suspicion of DUI.
>
> That same night, Appellant was taken to the Police Detention Unit where blood was drawn for testing at approximately 10:23 P.M. The toxicology report for Appellant determined that his Blood Alcohol Concentration (BAC) was .16%.

Trial Court Opinion, 7/26/13, 2-3.

After unsuccessfully litigating a suppression motion, Appellant appeared for a waiver trial. He was found guilty of both DUI counts, and the trial court sentenced him to seventy-two hours to six months of incarceration. This timely appeal followed. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issue:

> Did not the trial court err in permitting a Commonwealth expert witness to testify to the findings contained in a blood analysis performed by a non-testifying technician, as the expert's testimony is inadmissible hearsay and Appellant had no opportunity to cross-examine the technician, in violation of his rights under the Confrontation Clause of the United States Constitution?

Appellant's Brief at 3.

At trial, Appellant objected to the Commonwealth's expert, Dr. Richard Cohn, testifying to the contents of a toxicology report he prepared regarding Appellant's BAC. ***See*** N.T., 2/26/13, at 50. According to Appellant, because the expert did not personally perform the tests on Appellant's blood, the expert's testimony was inadmissible hearsay. ***Id.*** The trial court overruled Appellant's objection. ***Id.*** at 51.

In his brief, Appellant provides no separate hearsay analysis. Rather, he contends:

> The Confrontation Clause of the United States Constitution precludes the admission of testimonial statements by non-testifying witnesses even if the statement would otherwise be admissible under state rules of evidence. The Supreme Court of the United States has consistently ruled that a laboratory technician's report is testimonial and cannot be introduced by a surrogate. While Dr. Cohn authored the report which was introduced at trial and from which he testified, the fact that the results were indeed those from Appellant's blood was based on statements by non-testifying analysts who actually handled the specimens and performed the tests. Dr. Cohn did not see nor did he have knowledge of the testing process other than through the statements of others that the sample was properly handled, documented, and recorded.
>
> The ability to confront the non-testifying analysts was crucial in the instant case to expose laboratory error. Despite Appellant's uncontested daily doses of medications which Dr. Cohn testified would have shown up in any test of Appellant's blood, none of these medications appeared in the tested specimens.

Appellant's Brief at 10-11.

"Whether Appellant 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 plenary." ***Commonwealth v. Gatlos***, 76 A.3d 44, 63 (Pa. Super. 2013) (citations omitted).

This Court rejected an identical claim of a confrontation violation in ***Commonwealth v. Yohe***, 39 A.3d 381 (Pa. Super. 2012). Moreover, our rationale was affirmed recently by a unanimous decision of our Supreme Court. ***Commonwealth v. Yohe***, 79 A.3d 520 (Pa. 2013). In ***Yohe***, after a thorough review of the parties' arguments, as well as the pertinent federal case law, the high court concluded:

> We hold, therefore that Dr. Blum's expert opinion was contained in the Toxicology Report and was the result of his independent verification of the chain of custody and his independent analysis of the three test results produced by two lab technicians running two types of tests at different times. We agree with the Commonwealth and the Superior Court that the testimonial document was the certified Toxicology Report prepared and signed by Dr. Blum, and that the Commonwealth met its obligation to present the analyst who signed the certificate to trial consistent with [federal case law].

Yohe, 79 A.3d at 541.

Appellant asserts that ***Yohe*** "is not controlling here" because our Supreme Court "in ***Yohe*** was never concerned with identification of the source of the tested blood." Appellant's Brief at 22. Appellant bases his assertion on his on self-serving testimony that he took several medications daily, which, as Dr. Cohn conceded, should have been present in Appellant's

blood tests. From this testimony, Appellant extrapolates his claim of laboratory error. We find no merit to this claim.

Appellant's claim of laboratory error goes to the weight of the evidence rather than its admissibility. While Appellant's testimony regarding his medical condition and treatment was not contested by the Commonwealth, it still had to be credited by the trial court as fact finder. "The fact finder is free to believe all, part or none of the evidence and to determine the credibility of witnesses." ***Commonwealth v. Keaton***, 729 A.2d 529, 540 (Pa. 1999). Given the guilty verdicts, the trial court did not find Appellant's testimony to be persuasive. We cannot disturb this determination. ***See id.*** at 540-41. Moreover, as stated by our Supreme Court in ***Yohe***:

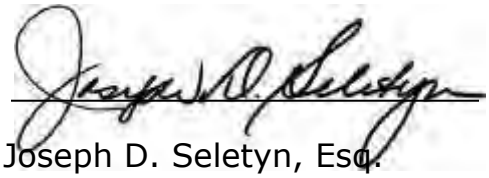
> [I]f a defendant believes that [laboratory] errors exist, or possibly exist, the defendant may subpoena the lab technician who ran the test, or indeed, anyone else, as appropriate, to prove such impropriety. Our holding does not affect a defendant's ability in this regard. However, the remote potentiality of [error or] misconduct should not serve as a basis to permit every defendant in every case to engage in a proverbial fishing expedition, when it is not constitutionally mandated.

Yohe, 79 A.3d at 542.

In sum, the testimony of Dr. Cohn, "who analyzed the test results of Appellant's blood, determined the BAC by comparing the results, and authored the Toxicology Report, satisfied Appellant's right to confrontation." ***Id.*** at 543. Thus, because the trial court properly admitted Dr. Cohn's testimony and report, we affirm Appellant's judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014