

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF
		PENNSYLVANIA
Appellee		
v.		
DENNIS MITCHELL ORENYAK,		
Appellant		No. 1981 WDA 2011

Appeal from the Judgment of Sentence May 18, 2009  
In the Court of Common Pleas of Allegheny County  
Criminal Division at No(s): CP-02-CR-0004597-2007

BEFORE: BOWES, MUNDY, and COLVILLE,\* JJ.

MEMORANDUM BY BOWES, J.:

**FILED OCTOBER 16, 2013**

Dennis Mitchell Orenyak appeals from the judgment of sentence of three to six years imprisonment followed by ten years probation. Judgment of sentence was imposed after a jury convicted Appellant of homicide by vehicle while driving under the influence—incapable of safe driving, and driving under the influence—incapable of safe driving, and the jury acquitted him of homicide by vehicle and involuntary manslaughter. We affirm.

Appellant’s convictions are based upon the following evidence:

This matter arises out of a motor vehicle accident which occurred at 1:14 p.m. on January 30, 2007 on S.R. 48 in McKeesport, Pa. At that time the victim, Madalen Minydzak, was driving her vehicle in a northerly direction on S.R. 48 when Defendant pulled out of the driveway of a car wash on the east

---

\* Retired Senior Judge assigned to the Superior Court.

side of the highway and struck the passenger's side of the victim's vehicle. The impact caused the victim's vehicle to spin into the southbound lanes into the path of an oncoming tractor trailer. The tractor trailer struck the driver's side of the victim's vehicle resulting in immediately fatal blunt force injuries to the victim's head, neck and torso. (T., p. 38)

At trial the Commonwealth called Sergeant Carl Kuzel of the McKeesport Police Department who testified that at approximately 1:14 p.m. on January 30, 2007, he was dispatched to a motor vehicle accident on S.R. 48, also known as Long Run Road. (T., pp. 63-64) Defendant was identified as the driver of one of the cars involved in the accident. Sergeant Kuzel approached Defendant who was speaking to another officer. Sergeant Kuzel noted that Defendant's speech was slurred and he had an odor of alcohol about him. (T., p. 68) As a result, the decision was made to conduct field sobriety tests on Defendant. The Commonwealth called Officer Cischke who testified that he spoke to Defendant at the scene and noted that his speech was heavily slurred but he did not notice an odor (sic) of alcohol about him (T., p. 80) Officer Cischke testified that Defendant described the accident as follows:

"He advised that he was at the exit of 714 Long Run Road Car Wash attempting to make a left hand turn travelling southbound on Long Run Road. He advised that he had looked left to see the northbound traffic, to see if it was clear. He saw that the No. 1's vehicle, Minydzak vehicle, deemed that it was at a safe distance. He looked in the right lane of traffic which was going southbound. He did not see any traffic, at which time he attempted to make a left hand turn, he advised, at which time his vehicle collided into Unit No. 2, which would be the deceased. Unit No. 2, from my conclusion, spun into the southbound lanes at which time the tractor trailer. Unit No. 3 collided into the driver's side door." (T., p. 75).

Defendant denied being injured in the accident or having any disabilities. (T., p. 81) Officer Cischke then asked Defendant for his license, registration and insurance cards and observed that Defendant was staggering and his gait was unsteady as he walked to his vehicle to retrieve the documents. (T., p. 80)

Officer Cischke testified he then administered three field sobriety tests, including the finger dexterity and one leg stand test, both of which Defendant failed; and, the alphabet test, which Defendant passed. (T., p. 84) Lt. Thomas Greene also testified that he witnessed the field sobriety tests and at one point had to catch Defendant because he stumbled and was going to fall. He also noted an odor of alcohol on Defendant. It was his opinion that Defendant was incapable of safe driving. (T., p. 111) Based on the observations of Defendant and his performance of the field sobriety tests, Defendant was transported to UPMC McKeesport Hospital where Defendant consented to have blood drawn and urine taken. The blood drawn at 2:45 p.m. showed a BAC of .082% and urine alcohol of .123%. (T., pp. 162,222) The Commonwealth also called Sergeant Scott Scherer of the Allegheny County Police Department who testified that, while at McKeesport Hospital, he advised Defendant of his **Miranda** rights and Defendant then gave the following statement:

"He said that he had gone to visit his mother that morning on the 30<sup>th</sup>. After visiting his mother at approximately 1:00 p.m., he had gone to the You Do It Car Wash on Route 48. He said he got done washing his car. He pulled to the end of the parking lot at Route 48. He said he recalled that it was snowing and it was very windy. He looked to his left. He intended to make a left hand turn, looked to his left and saw a car. According to my report, he said it was 'way off to his left.' He said he paused for a moment, he went to pull onto the roadway and suddenly that same car was right in front of him, and he remembers striking the passenger's side of the vehicle." (T., p. 168)

Sergeant Scherer testified that Defendant denied any problems with the operation of his vehicle and also stated:

"And I then asked him if he consumed any alcohol recently or drugs. He told me that he did not do drugs. However, the previous night he had been drinking vodka. He said he had been drinking vodka between 8:00 p.m. and 11:00 p.m. the previous night. He had gone to bed at 11:00 p.m. and slept for approximately 10 hours. I asked him how long he slept. He slept for approximately 10 hours.

That's when he woke up on this day at 9:00 a.m. in the morning. I asked him if had consumed any alcohol on this particular day. He told me that he had not." (T., p. 168)

The Commonwealth also called Detective Robert Keenan, an accident reconstruction expert. (T., p. 178) Detective Keenan testified that based on his examinations of the victim's vehicle and the tractor trailer, including the event data recorders from the vehicles, he determined that the victim's vehicle was traveling at 55 m.p.h at the time of the initial impact and that the angle of the impact between the victim's vehicle and Defendant's vehicle was consistent with the Defendant's statement that he was attempting to make a left turn from the driveway onto S.R. 48 when the collision occurred. (T., p. 188) He also testified that the speed limit on S.R. 48 was 40 m.p.h. (T., p. 201) His investigation also confirmed that after being hit, the victim's vehicle spun into the path of the tractor trailer, which weighed 32,800 lbs. (T., p. 190) Detective Keenan also testified that he found no evidence of any mechanical defects in the tractor trailer and confirmed the testimony of the driver of the tractor trailer that he was not speeding prior the accident. (T., p. 197,198) On cross examhiation, Detective Keenan also testified concerning a time and distance study that had been conducted at the request of the District Attorney's office approximately one year after the accident. (T., p. 202) According to this study, if Defendant was, in fact, stopped behind a sign that was adjacent to the driveway, there would be a period of approximately four seconds when he would not be able to observe a car coming from his left, as the victim's vehicle was. (T., p. 203) Detective Keenan testified that at the speed the victim was driving, her vehicle would not be visible due to the sign when she was between 461 feet and 182 feet away from the point of the collision and that it would take the victim approximately four seconds to travel that distance. (T., p. 203) He noted, however, that if Defendant was behind the sign his view would not be blocked in the same manner if he moved forward or backward. (T., p. 207) Finally Detective Keenan testified that Defendant's vehicle was moving approximately 10 m.p.h. at the time of the collision. (T., p. 208)

The Commonwealth called Jennifer Janssen, the Assistant Chief Toxicologist of the Allegheny County Medical Examiner's Office, who testified concerning her analysis of Defendant's blood

and urine tests and the relation of those results to Defendant's BAC at the time of the collision. Ms. Janssen testified that based on Defendant's weight, the range of possible dissipation rates, the 5% margin of error and the BAC .082% at 2:45 p.m., that Defendant's blood alcohol rate at the time of the accident would have been between .093% and .116% (T., pp. 222- 224) Ms. Janssen also testified that Defendant's blood alcohol content at 11:00 p.m. the previous night, when he stated he last consumed alcohol, would have been between .239 to .397 percent and Defendant would have had to consume between 12 ½ and 26 ½ ounces of alcohol to achieve that blood alcohol content. (T., p. 233) Janssen also testified concerning the effects of alcohol as a central nervous system depressant, including the effects on judgment, visual acuity, perception of objects in the peripheral field, risk taking and reaction responses. She testified that these effects begin with concentration levels as low as .04 to .05, (T., pp. 234-235) She also opined that having a blood alcohol level of .104% would be inconsistent with safe operation of a motor vehicle. (T., p. 237)

Trial Court Opinion, 1/2/13, at 2-6.

On appeal, Appellant presents two issues for our review:

I. Is evidence sufficient to convict of homicide by vehicle while driving under the influence when the Commonwealth fails to prove the defendant's intoxication caused the traffic accident?

II. Is evidence sufficient to prove the DUI element of homicide by vehicle while DUI and DUI: general impairment when the Commonwealth fails to show that the defendant imbibed a sufficient amount of alcohol to render him incapable of safe driving?

Appellant's brief at 4.

Appellant's issues are subject to the following standards:

A challenge to the sufficiency of the evidence is a question of law, subject to plenary review. When reviewing a sufficiency of the evidence claim, the appellate court must review all of the evidence and all reasonable inferences drawn therefrom in the light most favorable to the Commonwealth, as the verdict

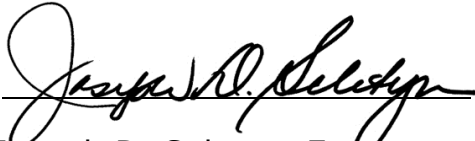
winner. Evidence will be deemed to support the verdict when it establishes each element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. The Commonwealth need not preclude every possibility of innocence or establish the defendant's guilt to a mathematical certainty. 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. Teems**, 2013 WL 3361240, 2 (Pa.Super. 2013) (quoting **Commonwealth v. Toland**, 995 A.2d 1242, 1245 (Pa.Super. 2010)).

After consideration of the facts, briefs, and applicable law, we affirm on the basis of the comprehensive and persuasive January 2, 2013 opinion of the Honorable Randal B. Todd.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above the printed name and title.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 10/16/2013

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

CRIMINAL DIVISION

v.

NO. CC 200704597

DENNIS MITCHELL ORENYAK,

Defendant.

**OPINION**

JUDGE RANDAL B. TODD

COPIES SENT TO:

Counsel of Record for the  
Commonwealth of Pennsylvania:

Stephen A. Zappala, Jr.  
District Attorney

By

Michael W. Streily, Esquire  
Office of the District Attorney  
401 Allegheny County Courthouse  
403 Grant Street  
Pittsburgh, PA 15219

Office of Public Defender  
Appellate Unit  
400 County Office Building  
542 Forbes Avenue  
Pittsburgh, PA 15219

Dennis Orenyak (JB1665)  
SCI Waymart  
Box 256  
Waymart, PA 18472-0256

FILED  
2013 JAN -2 PM 3: 09  
DEPT OF COURT RECORDS  
CRIMINAL DIVISION  
ALLEGHENY COUNTY PA

**APPENDIX A**

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	)	CRIMINAL DIVISON
	)	
v.	)	NO: CC 200704597
	)	
DENNIS MITCHELL ORENYAK,	)	
	)	
Defendant.	)	

January 2, 2013

TODD, J.

**OPINION**

This is an appeal by Defendant, Dennis Mitchell Orenyak, after he was found guilty after a jury trial on February 26, 2009 of Homicide by Vehicle While Driving Under the Influence in violation of 75 Pa.C.S.A. §3735(a) and Driving Under the Influence - General Impairment in violation of 75 Pa.C.S.A. §3802(a)(1). Defendant was found not guilty of Homicide by Vehicle in violation of 75 Pa.C.S.A. §3732; Involuntary Manslaughter in violation of 18 Pa.C.S.A. §2504; and, Driving Under the Influence - General Impairment/BAC .08-.10 in violation of 75 Pa.C.S.A. §3802(a)(2). Defendant was sentenced on May 18, 2009 to a mandatory period of incarceration of three to six years and ten years of probation. No direct appeal was filed at that time. As a result of a PCRA Petition filed by Defendant, Defendant's direct appellate rights were reinstated on November 14, 2011 . On December 14, 2011, a Notice of Appeal was filed with the Superior Court. On December 15, 2011 an Order was entered directing Defendant to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. §1925(b).



On January 5, 2012, Defendant's Statement of Errors Complained of on Appeal was filed, which set forth the following issues:

"a. The evidence was not sufficient to prove Driving Under the Influence – Impaired Driving. The Commonwealth failed to prove beyond a reasonable doubt that Mr. Orenyak imbibed a sufficient amount of alcohol to render him incapable of safe driving.

b. The evidence was not sufficient to prove Driving Under the Influence – Impaired Driving with Injury or Death. Commonwealth failed to prove beyond a reasonable doubt that Mr. Orenyak imbibed a sufficient amount of alcohol to render him incapable of safe driving.

c. The evidence was not sufficient to prove Homicide by Vehicle While Driving Under the Influence since several elements were not shown beyond a reasonable doubt.

1. First, the Commonwealth did not prove that Mr. Orenyak imbibed a sufficient amount of alcohol to render him incapable of safe driving.

2. Second, the Commonwealth did not prove that Mr. Orenyak acted recklessly or with gross negligence in causing the death of Ms. Minydzak.

3. In the alternative, the Commonwealth did not prove that Mr. Orenyak's intoxication and/or reckless driving caused the traffic accident on which the charges were based. The Commonwealth did not establish causation beyond a reasonable doubt."

## **BACKGROUND**

This matter arises out of a motor vehicle accident which occurred at 1:14 p.m. on January 30, 2007 on S.R. 48 in McKeesport, Pa. At that time the victim, Madalen Minydzak, was driving her vehicle in a northerly direction on S.R. 48 when Defendant pulled out of the driveway of a car wash on the east side of the highway and struck the passenger's side of the victim's vehicle. The impact caused the victim's vehicle to spin into the southbound lanes into the path of an oncoming tractor trailer. The tractor trailer struck the driver's side of the victim's vehicle resulting in immediately fatal blunt force injuries to the victim's head, neck and torso.

(T., p. 38)

At trial the Commonwealth called Sergeant Carl Kuzel of the McKeesport Police Department who testified that at approximately 1:14 p.m. on January 30, 2007 he was dispatched to a motor vehicle accident on S.R. 48, also known as Long Run Road. (T., pp. 63-64) Defendant was identified as the driver of one of the cars involved in the accident. Sergeant Kuzel approached Defendant who was speaking to another officer. Sergeant Kuzel noted that Defendant's speech was slurred and he had an odor of alcohol about him. (T., p. 68) As a result, the decision was made to conduct field sobriety tests on Defendant. The Commonwealth called Officer Cischke who testified that he spoke to Defendant at the scene and noted that his speech was heavily slurred but he did not notice an odor of alcohol about him (T., p. 80) Officer Cischke testified that Defendant described the accident as follows:

"He advised that he was at the exit of 714 Long Run Road Car Wash attempting to make a left hand turn travelling southbound on Long Run Road. He advised that he had looked left to see the northbound traffic, to see if it was clear. He saw that the No. 1's vehicle, Minydzak vehicle, deemed that it was at a safe distance. He looked in the right lane of traffic which was going southbound. He did not see any traffic, at which time he attempted to make a left hand turn, he advised, at which time his vehicle collided into Unit No. 2, which would be the deceased. Unit No. 2, from my conclusion, spun into the southbound lanes at which time the tractor trailer. Unit No. 3 collided into the driver's side door." (T., p. 75)

Defendant denied being injured in the accident or having any disabilities. (T., p. 81) Officer Cischke then asked Defendant for his license, registration and insurance cards and observed that Defendant was staggering and his gait was unsteady as he walked to his vehicle to retrieve the documents. (T., p. 80) Officer Cischke testified he then administered three field sobriety tests, including the finger dexterity and one leg stand test, both of which Defendant failed; and, the alphabet test, which Defendant passed. (T., p. 84) Lt. Thomas Greene also testified that he witnessed the field sobriety tests and at one point had to catch Defendant because he stumbled and was going to fall. He also noted an odor of alcohol on Defendant. It was his opinion that

Defendant was incapable of safe driving. (T., p. 111) Based on the observations of Defendant and his performance of the field sobriety tests, Defendant was transported to UPMC McKeesport Hospital where Defendant consented to have blood drawn and urine taken. The blood drawn at 2:45 p.m. showed a BAC of .082% and urine alcohol of .123%. (T., pp. 162,222) The Commonwealth also called Sergeant Scott Scherer of the Allegheny County Police Department who testified that, while at McKeesport Hospital, he advised Defendant of his Miranda rights and Defendant then gave the following statement:

"He said that he had gone to visit his mother that morning on the 30<sup>th</sup>. After visiting his mother at approximately 1:00 p.m., he had gone to the You Do It Car Wash on Route 48. He said he got done washing his car. He pulled to the end of the parking lot at Route 48. He said he recalled that it was snowing and it was very windy. He looked to his left. He intended to make a left hand turn, looked to his left and saw a car. According to my report, he said it was 'way off to his left.' He said he paused for a moment, he went to pull onto the roadway and suddenly that same car was right in front of him, and he remembers striking the passenger's side of the vehicle." (T., p. 168)

Sergeant Scherer testified that Defendant denied any problems with the operation of his vehicle and also stated:

"And I then asked him if he consumed any alcohol recently or drugs. He told me that he did not do drugs. However, the previous night he had been drinking vodka. He said he had been drinking vodka between 8:00 p.m. and 11:00 p.m. the previous night. He had gone to bed at 11:00 p.m. and slept for approximately 10 hours. I asked him how long he slept. He slept for approximately 10 hours. That's when he woke up on this day at 9:00 a.m. in the morning. I asked him if had consumed any alcohol on this particular day. He told me that he had not." (T., p. 168)

The Commonwealth also called Detective Robert Keenan, an accident reconstruction expert. (T., p. 178) Detective Keenan testified that based on his examinations of the victim's vehicle and the tractor trailer, including the event data recorders from the vehicles, he determined that the victim's vehicle was traveling at 55 m.p.h at the time of the initial impact and that the angle of the impact between the victim's vehicle and Defendant's vehicle was consistent with the

Defendant's statement that he was attempting to make a left turn from the driveway onto S.R. 48 when the collision occurred. (T., p. 188) He also testified that the speed limit on S.R. 48 was 40 m.p.h. (T., p. 201) His investigation also confirmed that after being hit, the victim's vehicle spun into the path of the tractor trailer, which weighed 32,800 lbs. (T., p. 190) Detective Keenan also testified that he found no evidence of any mechanical defects in the tractor trailer and confirmed the testimony of the driver of the tractor trailer that he was not speeding prior the accident. (T., p. 197,198) On cross examination, Detective Keenan also testified concerning a time and distance study that had been conducted at the request of the District Attorney's office approximately one year after the accident. (T., p. 202) According to this study, if Defendant was, in fact, stopped behind a sign that was adjacent to the driveway, there would be a period of approximately four seconds when he would not be able to observe a car coming from his left, as the victim's vehicle was. (T., p. 203) Detective Keenan testified that at the speed the victim was driving, her vehicle would not be visible due to the sign when she was between 461 feet and 182 feet away from the point of the collision and that it would take the victim approximately four seconds to travel that distance. (T., p. 203) He noted, however, that if Defendant was behind the sign his view would not be blocked in the same manner if he moved forward or backward. (T., p. 207) Finally Detective Keenan testified that Defendant's vehicle was moving approximately 10 m.p.h. at the time of the collision. (T., p. 208)

The Commonwealth called Jennifer Janssen, the Assistant Chief Toxicologist of the Allegheny County Medical Examiner's Office, who testified concerning her analysis of Defendant's blood and urine tests and the relation of those results to Defendant's BAC at the time of the collision. Ms. Janssen testified that based on Defendant's weight, the range of possible dissipation rates, the 5% margin of error and the BAC .082% at 2:45 p.m., that

Defendant's blood alcohol rate at the time of the accident would have been between .093% and .116% (T., pp. 222- 224) Ms. Janssen also testified that Defendant's blood alcohol content at 11:00 p.m. the previous night, when he stated he last consumed alcohol, would have been between .239 to .397 percent and Defendant would have had to consume between 12 ½ and 26 ½ ounces of alcohol to achieve that blood alcohol content. (T., p. 233) Janssen also testified concerning the effects of alcohol as a central nervous system depressant, including the effects on judgment, visual acuity, perception of objects in the peripheral field, risk taking and reaction responses. She testified that these effects begin with concentration levels as low as .04 to .05, (T., pp. 234-235) She also opined that having a blood alcohol level of .104% would be inconsistent with safe operation of a motor vehicle. (T., p. 237) After being appropriately charged on each of the offenses, the jury found Defendant guilty of Homicide by Vehicle while DUI and DUI - General Impairment. He was found not guilty of Homicide by Vehicle, Involuntary Manslaughter and Driving Under the Influence, BAC between .08 and .10.

#### **DISCUSSION**

In the first and second assignments of error in his Concise Statement Defendant contends that the evidence was insufficient to permit the Commonwealth to prove beyond a reasonable doubt that Defendant imbibed a sufficient amount of alcohol to render him incapable of safe driving in violation of 75 Pa.C.S.A. §3802(a)(1) and §3735. When reviewing a sufficiency of the evidence claim the evidence must be viewed in the light most favorable to the Commonwealth, as verdict winner, to determine if there is sufficient evidence to enable a fact-finder to find every element of the crime charged beyond a reasonable doubt. *Commonwealth v. McNair*, 603 A.2d 1014 (1992). It is exclusively within the province of the fact-finder to believe

none, some or all of the evidence presented. *Commonwealth v. Henry*, 569 A.2d 929, 939 (1990); *Commonwealth v. Jackson*, 485 A.2d 1102 (1984). If the fact finder reasonably could have determined from the evidence presented that all of the necessary elements of the crime were established, then that evidence will be deemed sufficient to support the verdict. *Commonwealth v. Wood*, 637 A.2d 1335, 1343 (1994); *Commonwealth v. Hopkins*, 747 A.2d 910, 914 (Pa. Super. 2000)

75 Pa.C.S.A. §3802 (a)(1) provides as follows:

(a) General Impairment.—

(1) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle. 75 Pa.C.S.A. §3802

In *Commonwealth v. Smith*, 831 A.2d 636 (Pa. Super. 2003) the Court addressed the evidence necessary to convict under the predecessor statute to §3802(a)(1) as follow:

In order to prove a violation of this section, the Commonwealth must show: (1) that the defendant was the operator of a motor vehicle and (2) that while operating the vehicle, the defendant was under the influence of alcohol to such a degree as to render him or her incapable of safe driving. To establish the second element, it must be shown that alcohol has substantially impaired the normal mental and physical faculties required to safely operate the vehicle. Substantial impairment, in this context, means a diminution or enfeeblement in the ability to exercise judgment, to deliberate or to react prudently to changing circumstances and conditions. Evidence that the driver was not in control of himself, such as failing to pass a field sobriety test, may establish that the driver was under the influence of alcohol to a degree which rendered him incapable of safe driving, notwithstanding the absence of evidence of erratic or unsafe driving. *Commonwealth v. Palmer*, 751 A.2d 223, 228 (Pa. Super. 2000) (citations and footnote omitted). *Commonwealth v. Smith*, 831 A.2d 636, 638 (Pa. Super. 2003)

In addition, despite the fact that a specific BAC is not an element of the offense, a defendant's BAC is relevant evidence that may be considered by the jury. In *Commonwealth v. Thur*, 906 A.2d 552 (Pa. Super. 2006) the court stated:

A specific BAC (at any time) is not an element that must be proven under (a)(1). However, BAC evidence is nonetheless admissible as one factor which the jury can consider when determining whether a driver was incapable of safe operation. Commonwealth v. Zugay, 745 A.2d 639, 646-47 (Pa.Super.2000). Commonwealth v. Thur, 906 A.2d 552, 565-66 (Pa. Super, 2006)

In addition, 75 Pa.C.S.A. §1547 (c) provides that in any proceeding in which defendant is charged with a violation of section 3802 or any other violation arising out of the same action, the defendant's BAC is admissible in evidence.

In the present case, clearly there was sufficient evidence to permit the jury to find each of the elements of driving under the influence. The jury heard evidence that Defendant smelled of alcohol, staggered when he walked, failed two field sobriety tests and that 91 minutes after the accident had a BAC of .082% which, according to unchallenged expert testimony, indicated that he had a BAC at that time of the accident in a range between .093% and .116%. The jury also heard expert testimony concerning the affects of alcohol, some of which begin at levels as low as .04% and that Defendant's BAC at the time of the accident was inconsistent with being able to safely operate the vehicle. The jury heard the testimony of one of the investigating officers who opined that Defendant was incapable of safe driving. The jury also heard evidence that indicated that Defendant failed to observe vehicles on the highway as he pulled out of the car wash. Defendant either failed to observe the victim's vehicle or pulled out onto the highway when his view to his left was blocked for a substantial distance, without moving to allow him a proper view of the highway. In fact, the evidence establishes that Defendant failed to see or disregarded the tractor trailer approaching from his right as he pulled out onto the highway. Consequently there was more than sufficient evidence for the jury to find a violation of §3802 (a)(1).

Defendant also asserts that the evidence was insufficient to establish the elements of Homicide by Vehicle while DUI in violation of 75 Pa.C.S.A. §3735 (a) which provides as follows:

(a) Offense defined.--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).

In *Commonwealth v. Caine*, 683 A.2d 890, 892 (1996) the elements of §3735 (a) were defined as follows:

Homicide by vehicle while driving under the influence consists of three elements: "[1] a driving under the influence conviction, [2] the death of another person, and [3] the death as a direct result of driving under the influence." *Commonwealth v. Molinaro*, 429 Pa.Super. 29, 34, 631 A.2d 1040, 1042 (1993). Driving while legally intoxicated must be the "direct and substantial cause of the accident and the victim's death." *Id. Commonwealth v. Caine*, 683 A.2d 890, 892 (1996)

In the present case, for the reasons set forth above, there was sufficient evidence that Defendant was driving under the influence and that the death of another person occurred as a result of the accident. The final element is that Defendant's driving while under the influence was a direct and substantial cause of the death. In *Commonwealth v. Nicotra*, 625 A.2d 1259 (Pa. Super. 1993) the Superior Court stated:

Rather, the Commonwealth must prove a more direct causal relationship between the defendant's conduct and the victim's death. *Commonwealth v. Barnhart*, 345 Pa.Super. 10, 28, 497 A.2d 616, 626 (1985), cert. denied, 488 U.S. 817, 109 S.Ct. 55, 102 L.Ed.2d 34 (1988). See also: *Commonwealth v. Root*, 403 Pa. 571, 170 A.2d 310 (1961); *Commonwealth v. Lang*, 285 Pa.Super. 34, 426 A.2d 691 (1981). However, it has never been the law of this Commonwealth that criminal responsibility must be confined to a sole or immediate cause of death. *Commonwealth v. Stafford*, 451 Pa. 95, 301 A.2d 600 (1973); *Commonwealth v. Carn*, 449 Pa. 228, 296 A.2d 753 (1972); *Commonwealth v. Johnson*, 445 Pa. 276, 284 A.2d 734 (1971); *Commonwealth v. Cheeks*, 423 Pa. 67, 223 A.2d 291 (1966); *Commonwealth ex rel. Peters v. Maroney*, 415 Pa. 553, 204 A.2d 459 (1964). Criminal responsibility is properly assessed against one whose conduct was a



direct and substantial factor in producing the death even though other factors combined with that conduct to achieve the result. *Commonwealth v. Stafford*, supra. *Commonwealth v. Nicotra*, 625 A.2d 1259, 1263 (1993)

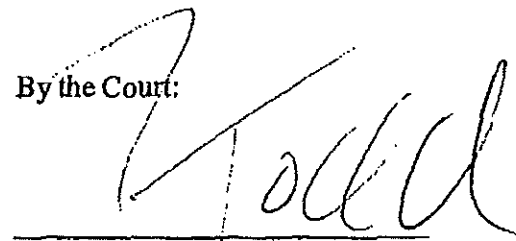
In the present case, there was sufficient evidence from which the jury could find that Defendant's driving while under the influence was a substantial and direct cause of the victim's death.

Defendant argued that the victim's speed and an obstructed view of the highway caused by a sign adjacent to the driveway he was exiting may have caused the accident and not his driving under the influence. However, the jury was appropriately charged that Defendant was not a direct cause of the death if the acts of the victim or the actions of a third party play such an independent, important, and overriding role in bringing about the death compared to the Defendant's conduct. The jury rejected Defendant's argument. Clearly the evidence would support the conclusion that the victim's vehicle was visible on the highway, regardless of her speed, and that Defendant either pulled out onto the highway after having failed to see her or failing to comprehend her position on the highway. Further, to the extent Defendant argued that his view of the highway would have been obstructed by a sign, the evidence permitted the jury to find that Defendant either disregarded the fact that he did not have a proper view of highway or elected to pull out not knowing whether traffic was approaching or not. Based on the testimony regarding the effects of alcohol on judgment, visual acuity, perception of objects in the peripheral field, risk taking and reaction responses there was sufficient evidence to permit the jury to find that Defendant's driving under the influence was a direct and substantial factor in causing the victim's death.

Finally, Defendant asserts that the Commonwealth failed to prove that he acted recklessly or was grossly negligent. The elements of reckless or grossly negligent conduct apply to the charge of Homicide by Vehicle pursuant to §3732 which provides that "any person who

recklessly or with gross negligence causes the death of another person" while violating any law apply to the operation of a motor vehicle is guilty of homicide. Likewise, reckless and grossly negligent conduct is necessary to find Involuntary Manslaughter in violation of 18 Pa.C.S.A. §2504. Defendant was found not guilty, however, of both these offenses. A review of the record establishes that there was sufficient evidence to find that the Commonwealth met its burden of proving each of the elements of the offenses for which Defendant was found guilty.

By the Court:

A handwritten signature in black ink, appearing to read "Todd", written over a horizontal line.

Todd, J.