[J-138-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 24 WAP 2005
	:	
Appellant	:	Appeal from the Order of the Court of Common Pleas of Allegheny County entered July 5, 2005 at No. CP-2-CR-0013158-2004.
v.	:	
BRADLEY G. DUDA,	:	
Appellee	:	ARGUED: September 11, 2006

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: MAY 31, 2007**

Today, the Majority upholds as constitutional a DUI statute that is materially identical to the DUI statute that this Court unanimously invalidated in Commonwealth v. Barud, 681 A.2d 162 (Pa. 1996). Because, in my view, our decision in Barud controls this case, I respectfully dissent.

In Barud, this Court examined the constitutionality of former Section 3731(a)(5) of the Motor Vehicle Code, which provided as follows:

> **§ 3731. Driving under influence of alcohol or controlled substance**
>
> **(a) Offense defined.--**A person shall not drive, operate or be in actual physical control of the movement of any vehicle:
>
> * * *
>
> (5) if the amount of alcohol by weight in the blood of the person is 0.10% or greater at the time of a chemical test of a sample of the person's breath, blood or urine, which sample is:

(i) obtained within three hours after the person drove, operated or was in actual physical control of the vehicle . . . .

* * *

75 Pa.C.S. § 3731(a)(5) (repealed by Act of Sept. 30, 2003, P.L. 120). Former Section 3731(a.1) further provided as follows:

> **(a.1) Defense.--**It shall be a defense to a prosecution under subsection (a)(5) if the person proves by a preponderance of evidence that the person consumed alcohol after the last instance in which he drove, operated or was in actual physical control of the vehicle and that the amount of alcohol by weight in his blood would not have exceeded 0.10% at the time of the test but for such consumption.

75 Pa.C.S. § 3731(a.1) (repealed by Act of Sept. 30, 2003, P.L. 120). This Court invalidated former Section 3731(a)(5) in Barud after finding the statute void for vagueness and overbreadth. Specifically, we determined that the statute, *inter alia*, "fail[ed] to provide a reasonable standard by which a person may gauge [his] conduct" and "fail[ed] to require proof that a person's BAC actually exceeded the legal limit at the time of driving." Barud, 681 A.2d at 163 (emphasis omitted).

In the case *sub judice*, we are asked to determine the constitutionality of Section 3802(a)(2) of the Motor Vehicle Code, adopted in obvious response to Barud, which provides as follows:

> **§ 3802. Driving under influence of alcohol or controlled substance**
>
> **(a) General impairment.--**
>
> * * *
>
> (2) 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 alcohol concentration in the individual's blood or breath is at least 0.08% but less than 0.10% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

75 Pa.C.S. § 3802(a). As appellee aptly notes, Section 3802(a)(2) differs from former Section 3731(a)(5) in only three respects, none of which is relevant to the constitutionality of either statute: (1) the prescribed limit is now 0.08% instead of 0.10%; (2) the person's urine may no longer be used to measure his BAC; and (3) the time period within which the BAC must be tested is now two hours instead of three.

Nevertheless, the Majority, without purporting to overrule Barud, determines that Section 3802(a) passes constitutional muster. In the Majority's view, Section 3802(a) "represents a legislative enlargement of the prohibited conduct so that it is now unlawful, not only to drive while under the influence, but also to ingest a substantial amount of alcohol and then operate a motor vehicle before the alcohol is dissipated to below a defined threshold." Majority Slip Op. at 15 (internal citation omitted). Unlike former Section 3731(a)(5), the Majority posits, Section 3802(a)(2) requires two elements: (1) "that the individual drove after drinking alcohol"; and (2) "that the amount of alcohol ingested before driving was enough to cause the individual's BAC level to be at least 0.08 percent and below 0.10 percent within two hours after driving." Id. The Majority concedes in a footnote that "similar elements could have been gleaned from the face of the provision struck down in Barud." Id. at n.9. Nevertheless, the Barud Court, we are told, "understood [former S]ection 3731(a)(5) differently, i.e., as not defining a new offense with these two elements, but providing an alternate method of proving the pre-existing offense." Id. Therefore, the Majority concludes that, because Section 3802(a)(5) has redefined the offense so as to include these two elements and thereby shifts the focus away from the individual's actual BAC while driving, the reasoning and holding of Barud do not apply here.

Absent the precedent that is Barud, the Majority's interpretation of Section 3802(a) might be tenable. However, I cannot reconcile it with Barud's interpretation of former Section 3731(a)(5), which I find materially indistinguishable from the statute before us. To

begin with, if the General Assembly had intended to redefine the offense so as to prohibit conduct in addition to merely driving under the influence, I suspect that it would have changed the name of the offense to reflect as much. Yet the heading prefixed to Section 3802 remains, like that of its predecessor, "Driving under influence of alcohol or controlled substance." 75 Pa.C.S. § 3802; 75 Pa.C.S. § 3731 (repealed); see 1 Pa.C.S. § 1924 (instructing that section headings may be used as an aid to statutory construction). The statute is obviously a legislative attempt to overrule our decision in Barud.

More importantly, in my view, when considered in conjunction with former Section 3731(a.1), former Section 3731(a)(5) proscribed the very same conduct as Section 3802(a)(2). Under former Section 3731(a.1), it was an affirmative defense to prove that the individual drank a sufficient amount of alcohol after driving such that his BAC would not have exceeded 0.10% at the time of the test but for such consumption. Instead of providing an affirmative defense, Section 3802(a)(2) establishes as an element that the individual drove "after imbibing" a sufficient amount of alcohol. The prosecution, of course, should have no problem proving this element through the testimony of the arresting police officer so long as the defendant fails to come forward with affirmative evidence of consumption after driving. Thus, the effect of the two statutes is indistinguishable: unless the defendant can somehow affirmatively prove that the fact that his BAC test results exceeded the maximum percentage was due to his consumption after driving, then he may be convicted of the offense. Under either statute, however, a person who drinks (or drinks to .08% excess) only after driving does not have fair notice that he is committing the offense of "[d]riving under influence of alcohol."

The two statutes are also identically imprecise in their arbitrary attempts to prohibit certain driving after consumption. Under both statutes, the time period within which the BAC test must be administered is longer than the maximum period within which alcohol is fully absorbed and reaches its peak level in the bloodstream. See Commonwealth v.

MacPherson, 752 A.2d 384, 387 n.3 (Pa. 2000) (noting that absorption takes up to ninety minutes after consumption). Between consumption and absorption, there is a period during which alcohol has no perceivable impairing effect on the body.[1] Id. Knowing this, an individual may drink a relatively small amount, experience no discernible change in his skills of coordination or perception, and therefore begin and complete a relatively short drive before his BAC exceeds 0.08%. Without ever having fair notice that he would thereby commit the offense of driving under the influence, the individual could ultimately test above the legal limit up to two hours later and therefore be prosecuted under Section 3802(a)(2).

Accordingly, what we deemed to be "the most glaring deficiency" of former Section 3731(a)(5) in Barud is no less true of Section 3802(a)(2) in the case *sub judice*: "the statute completely fails to require any proof that the accused's blood alcohol level actually exceeded the legal limit **at the time of driving.**" Barud, 681 A.2d at 166. The statute, like the predecessor enactment it seeks to revive, does not provide drivers with a reasonable standard to gauge what is criminal conduct, and what is not. Therefore, given the presence of the very same concerns that motivated this Court to strike down its predecessor in Barud, I would invalidate Section 3802(a)(2).

I would reject this thinly veiled attempt to overrule, by legislation, the constitutionally based decision in Barud. With this dissent, I do not minimize the serious problems posed by impaired drivers who take to our highways. As is not infrequently the case, however, the legislative response to the problem here paints with far too broad a brush. Therefore, I respectfully dissent.

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[1] The actual rate of absorption varies from person to person (depending upon such factors as height, weight, and metabolism) as well as from time to time (depending upon such factors as what and when the person last ate). See Commonwealth v. McCurdy, 735 A.2d 681, 687 (Pa. 1999) (Zappala, J., concurring, joined by Nigro, J.) (citing Robert J. Schefter, *Under the Influence of Alcohol Three Hours After Driving: The Constitutionality of the (a)(5) Amendment to Pennsylvania's DUI Statute*, 100 DICK. L. REV. 441, 465-66 (1996)).

Chief Justice Cappy joins this dissenting opinion.