**[J-53-2006]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

**CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.**

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| MATTHEW STEVEN DRABIC, | : | No. 152 MAP 2005 |
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| Appellee | : | Appeal from the Order of the |
| | : | Commonwealth Court entered on |
| | : | September 9, 2005, at 738 C.D. 2005, |
| v. | : | which affirmed the Order of the Court of |
| | : | Common Pleas of Bucks County, Civil |
| | : | Division, entered on March 10, 2005 at |
| COMMONWEALTH OF PENNSYLVANIA, | : | No. 04-5184-29-6. |
| DEPARTMENT OF TRANSPORTATION, | : | |
| BUREAU OF DRIVER LICENSING, | : | |
| | : | |
| Appellant | : | ARGUED: April 5, 2006 |

## DISSENTING OPINION

**MADAME JUSTICE NEWMAN** **DECIDED: September 27, 2006**

I respectfully dissent from the Majority Opinion. Additionally, I join the well-reasoned Dissenting Opinion of Mr. Justice Saylor in his discussion of Freundt v. PennDOT, 883 A.2d 503 (Pa. 2005). I find myself bound by the plain language of 75 Pa.C.S. § 1532 and, therefore, would not utilize the criminal doctrine of merger in a civil matter where double jeopardy concerns are not implicated absent an express directive to do so by the Legislature. Because the statute at issue does not contain such language, I would uphold the separate suspensions for each individual offense for which Matthew Drabic (Appellee) has been convicted.

At issue is the doctrine of merger of related offenses, which "is a rule of statutory construction designed to determine whether the legislature intended for the punishment of one offense to encompass that for another offense arising from the same criminal act or transaction." Commonwealth v. Anderson, 650 A.2d 20, 21 (Pa. 1994) (holding that aggravated assault is a lesser included offense of attempted murder); accord Blockburger v. United States, 284 U.S. 299, 304 (1932) (opining that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether they constitute two offenses or only one is to determine whether each provision requires proof of a fact that the other does not).

As this matter involves a civil consequence of a criminal act, we must start with the applicable sections of the civil sanctions provided by the Motor Vehicle Code:

> **(a) One-year suspension.--**The department shall suspend the operating privilege of any driver for one year upon receiving a certified record of the driver's **conviction** of or an adjudication of delinquency **based on any of the following offenses**:
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> * * *
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> (3) Any violation of the following provisions: Section 3735.1 (relating to aggravated assault by vehicle while driving under the influence).
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> * * *
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> **(a.1) Three-year suspension.--**The department shall suspend the operating privilege of any driver for three years upon receiving a certified record of the driver's **conviction** of or an adjudication of delinquency **based on a violation of any of the following offenses**:
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> * * *
>
> (2) Any violation of section 3735 (relating to homicide by vehicle while driving under influence).

75 Pa.C.S. § 1532(a),(a.1) (emphasis added). Accordingly, the statute indicates two separate penalties for Aggravated Assault while DUI and Homicide by Vehicle while DUI. Compare 75 Pa.C.S. § 1542(b) (requiring separate acts to sustain multiple penalties: "Three convictions arising from separate acts of any one or more of the following offenses . . . "). Interestingly, both parties claim that the plain language of the statute renders a result in his or its favor. See 1 Pa.C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.").

PennDOT argues that the penalties are separate and distinct and that no mention of merger is made. PennDOT further avers that merger is a criminal doctrine and there is no indication that the General Assembly intended for merger to apply in the plain language of this statute, involving an agency's institution of civil sanctions.

Conversely, Appellee argues that by omitting the fact that merger does not apply, and knowing that merger applies in criminal matters, the General Assembly evinced an intent to allow merger in the civil arena of license suspensions. I fail to find favor in the plain language interpretation proposed by Appellee or adopted by the Majority. "If the Legislature intended for merger not to apply, then § 1532 would be explicit in so saying. We cannot add a provision prohibiting merger to § 1532 on PennDOT's request because the Legislature has never done so itself." Maj. slip Op. at 11.

The omission of a negative, that is, not including language that merger does not apply, is not indicative of a desire on the part of the General Assembly for merger to apply. An action, in general, should be mandated and not implied when conducting a plain-language reading. The language differentiates the two acts and applies two different

suspensions with no mention of merging the suspensions.[1] Accordingly, the plain language of the statute weighs in favor of imposing individual suspensions for Aggravated Assault while DUI and Homicide by Vehicle while DUI.

In the present matter, the Commonwealth Court went beyond the plain language of the statute and instead cited prior precedent. The Commonwealth Court relied upon Zimmerman v. Department of Transportation, 759 A.2d 953 (Pa. Cmwlth. 2000) (*en banc*), petition for allowance of appeal denied, 788 A.2d 382 (Pa. 2001), and Xenakis v. Department of Transportation, 702 A.2d 572 (Pa. Cmwlth. 1997) (imposing three separate suspensions when the three convictions were distinct and separate), in determining that convictions may merge in a license suspension action.

In Zimmerman, the Commonwealth Court analyzed two suspensions imposed following convictions for both DUI and Aggravated Assault by Vehicle while DUI. Notably, Aggravated Assault while DUI is defined as follows:

> **(a) Offense defined.--**Any person who negligently causes serious bodily injury to 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 commits a felony of the second degree when the violation is the cause of the injury.

[1] If the legislature had desired for merger to apply, it would have been a simple matter to include, in language after the current subsection 1532(a.1), a statement that a three-year suspension for homicide by vehicle while DUI includes the suspension all lesser includes offenses (*e.g.,* DUI and Aggravated Assault while DUI).

75 Pa.C.S. § 3735.1. The statute incorporates the lesser offense of DUI as a necessary component for Aggravated Assault while DUI. The doctrine of merger in criminal matters would clearly dictate that the sentences merge.

The Commonwealth Court, by virtue of relying on Zimmerman, erred in holding that the merger doctrine was appropriate for license suspension purposes in PennDOT proceedings. The Commonwealth Court in Zimmerman cited three cases in support of the proposition that the suspensions should merge. See Anderson, supra (holding that aggravated assault is a lesser included offense of attempted murder); Commonwealth v. Everett, 705 A.2d 837 (Pa. 1998) (holding the same and stating that it is within the discretion of the trial court to choose to sentence for either the lesser included offense or the greater offense); Commonwealth v. Comer, 716 A.2d 593, 599 (Pa. 1998) ("[T]he elements of homicide by vehicle as charged are subsumed in the elements of involuntary manslaughter and neither offense requires proof which the other does not. Because imposing separate sentences violates double jeopardy the two offenses merge for [criminal] sentencing purposes.") (internal footnote deleted).[2]

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[2] Paradoxically, the Commonwealth Court in this case noted that:

> In Guidas v. Department of Transportation, Bureau of Driver Licensing, 655 A.2d 228 (Pa. Cmwlth. 1995), citing Department of Transportation, Bureau of Traffic Safety v. Antram, 409 A.2d 492 (Pa. Cmwlth. 1979), we held that while the lesser violation of reckless driving did, in fact, merge into the greater violation of Homicide by Vehicle and constituted one act, and where the trial court had made findings of fact or conclusions of law different from those made by PennDot, the trial court was vested with the authority to modify a penalty imposed by PennDot and order the six-month penalty for a violation of 75 Pa.C.S. §1532(b)(1) for reckless driving. **"Section 1532 does not require that each conviction arise out of a 'separate act.'"** Id. at 232. See also Richards v. Department of Transportation, Bureau of Driver

(continued…)

However, all three cases may be distinguished from the instant matter since they involved the criminal aspect of the convictions rather than the civil consequences that follow.

Neither party raised Freundt v. Department of Transportation, 883 A.2d 503 (Pa. 2005); however, the Majority notes that it is similar to a case decided this past year. In Freundt, this Court interpreted Section 1532(c) to merge drug-related charges for the purposes of license suspension. I joined the strong dissent of Justice Eakin, which Justice Saylor also joined,[3] and wrote a separate dissent.

> [T]he majority holds an "offense" for purposes of § 1532(c) means a single criminal episode; I believe this interpretation is inconsistent with both the language and the aim of § 1532(c). Secondly, even if the statute means "episode" when it says "offense," the burden of establishing that 16 crimes over several months are really a single episode must fall on the party so claiming-it cannot be PennDOT's burden to establish

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(…continued)

> Licensing, 827 A.2d 575 (Pa. Cmwlth.), petition for allowance of appeal denied, 841 A.2d 533 (Pa. 2003) [upholding the imposition of a one-year suspension and five-year suspension of drivers' license privileges based on the licensee's underlying convictions for two counts of Aggravated Assault by vehicle while DUI arising from single incident, and holding that the doctrine of merger of related offenses did not preclude imposition of both suspensions as administrative sanctions for underlying convictions arising from same incident].

Cmwlth. Ct. Op. at 6-7 (internal footnote omitted) (citations modified). As such, the Commonwealth Court affirmed its prior holding that the same criminal act may in fact result in multiple convictions. In the instant matter, those convictions, by the plain language of the statute, give rise to separate suspensions.

[3] See id. at 508 (Saylor, J., dissenting) ("I join the substance of Mr. Justice Eakin's dissenting opinion on the statutory interpretation point.").

> the "lack of single episode" when it is not a party to the underlying criminal investigation or conviction . . . .

Id. at 508 (Eakin, J., dissenting, joined by Newman, Saylor, J.J.). For reasons relating to the history and purpose of the doctrine of merger, discussed further infra, I stand by my dissent in Freundt. Moreover, the plain language of the instant matter differs slightly in that it allows for the imposition of suspensions for a "conviction . . . based on any of the following **offenses**," 75 Pa.C.S. § 1532(a), (a.1) (emphasis added), whereas subsection 1532(c) provides for suspension based upon "conviction of any **offense**[.]" 75 Pa.C.S. § 1532(c) (emphasis added). Hence, an argument could be made that the language of subsections 1532(a) and 1532(a.1) provides for a suspension based on any of the multiple offenses that follow and, thus, is different from the single suspension for a single offense involving any of the crimes listed in subsection 1532(c). However, I would find that in either case, the doctrine of merger should not apply.

Such a distinction starts with the nature of a driver's license suspension. In Commonwealth v. Wolf, 632 A.2d 864 (Pa. 1993) (finding that driver was not entitled to stay of mandatory one-year suspension of his license during pendency of driver's appeal of his criminal conviction), this Court opined that:

> [t]he mandatory suspension of a driver's license upon conviction for DUI is a collateral civil penalty administratively imposed by [PennDOT] pursuant to the mandates of the Motor Vehicle Code **not** the Crimes Code. Thus, the mandatory suspension is not a direct criminal penalty, but rather, is a civil sanction wholly unrelated to Petitioner's appeal of the criminal conviction to the Superior Court.

Id. at 867 (internal footnote deleted). We have developed this position further and held that license suspensions are collateral civil consequences and not criminal penalties and that: (1) there was statutory authority for suspension for out-of-state offense equivalent to Pennsylvania DUI offense; (2) imposition of suspensions did not violate motorists' double jeopardy rights; (3) suspensions did not violate motorists' equal protection or due process rights; and (4) New Jersey DUI conviction of one motorist was equivalent to DUI in Pennsylvania. Dep't of Transp. v. McCafferty, 758 A.2d 1155 (Pa. 2000); accord Commonwealth v. Duffey, 639 A.2d 1174 (Pa.), *cert. denied*, 513 U.S. 884 (1994). In fact, in Duffey, this Court expressly allowed for a license suspension for out-of-state conduct and conviction as not violating either the double jeopardy clause or 18 Pa.C.S. § 111 (noting when prosecution is barred by former prosecution in another jurisdiction). This Court has clearly held that an administrative agency over which a criminal judge has no control cannot be considered criminal in nature. Duffey, 639 A.2d at 1177. We opined that: (1) loss of driving privileges is a **collateral civil consequence of conviction** for underage drinking and, accordingly, there is no requirement that licensee know that consequence at time of guilty plea; (2) it is not proper for licensee to attack validity of criminal conviction upon which Department of Transportation (DOT) based its suspension in a civil proceeding; and (3) operating privileges suspensions for underage drinking are properly appealable to the Commonwealth Court. Id. "[W]e hold today that a licensee does not have to be warned of the collateral consequences of license suspension." Id. (holding additionally that we would recommend that a defendant be informed of the collateral consequence but that it is not necessary). The Commonwealth Court has followed this reasoning and noted our decision in Duffey, stating that "a license suspension is a collateral civil consequence of a criminal conviction, and there is no requirement that a criminal court advise a licensee that his or her conviction will result in a license suspension." Xenakis, 702 A.2d at 574 n.1

(citing Duffey, supra). For that reason, PennDOT concludes that the criminal doctrine of merger is inapposite.

Using the reasoning in Duffey, the concerns of double jeopardy and the constitutional protections against it, U.S. Const. amend. V, XIV, are not present when the matter is solely civil in nature. For this reason, I am compelled to find that, absent express language to the contrary, Section 1532 does not mandate merger and separate suspensions may be imposed. Furthermore, the sanctions imposed are remedial and not punitive in nature. PennDOT avers that the underlying concern of the merger doctrine is absent, specifically double jeopardy. See Ponce v. Dep't of Transp., 685 A.2d 607, 610 (Pa. Cmwlth. 1996), petition for allowance of appeal denied, 694 A.2d 625 (Pa. 1997) (holding that the suspension of driving privileges is remedial and not punitive in nature); Urciuolo v. Dep't of Transp., 684 A.2d 1094 (Pa. Cmwlth. 1996), petition for allowance of appeal denied, 690 A.2d 1165 (Pa. 1997) (same).

PennDOT notes that, in Commonwealth v. Buffington, 828 A.2d 1024, 1030 n.9 (Pa. 2003), this Court stated that Blockburger is to be "used as a means of assessing legislative intent in the context of the double jeopardy protections against successive prosecutions and multiple punishments."

The United States Supreme Court has noted that the Double Jeopardy Clause: (1) "protects against a second prosecution for the same offense after acquittal[;] . . . [(2)] protects against a second prosecution for the same offense after conviction[;] . . . [and 3] protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794 (1989)

(internal footnotes deleted). Prosecutions involve criminal matters and the punishments discussed involve the criminal sanctions and punishments imposed. License suspensions are a collateral civil consequence and not a punishment; and, as noted above, a defendant in a criminal case need not be informed of the collateral consequence, as it is not part of his or her criminal punishment. Duffey, supra.

Instead, the measures are of a more remedial nature. PennDOT argues that the recent increase in penalties for both homicide by vehicle while DUI and homicide by vehicle, from one year to three years' suspension, indicates that the legislative intent is to increase the potential suspension for any person convicted of any offense or offenses and keep those drivers off the road. PennDOT cites a litany of statistics to show the overwhelming danger posed by drunk drivers. This Court is well aware of the horrific cost to society due to drunk driving. We agree that part, if not all, of the reasoning behind a license suspension is: (1) that a drunk driver has shown himself or herself unfit to be trusted on the road; and (2) to protect the public at large. Such reasoning comes from the viewpoint of remediation and not from one of punishment. Accordingly, the secondary concern of double jeopardy, multiple punishments, is not at issue.

The plain language of Section 1532 coupled with the civil and remedial nature of the sanctions involved in the Motor Vehicle Code lead me to the conclusion that merger does not apply. Consequently, I would reverse the Commonwealth Court.

Mr. Justice Eakin joins this dissenting opinion.