NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JOHN FITZGERALD KELLY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1180 EDA 2012

Appeal from the Judgment of Sentence of March 20, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0002717-2011

BEFORE: OLSON, J., WECHT, J., and COLVILLE, J.*

MEMORANDUM BY WECHT, J.: **FILED JUNE 05, 2013**

John Fitzgerald Kelly ("Appellant") challenges the judgment of sentence imposed for his conviction of driving under the influence of alcohol ("DUI") pursuant to 75 Pa.C.S. § 3802(a)(1). We affirm.

The trial court set forth the factual history as follows:

> On January 27, 2010, [at approximately 9:50 A.M.,] Police Officer Colleen Keenan responded to a radio call on the 1800 block of Merlin Place in Philadelphia. Notes of Testimony ("N.T."), 3/15/2012, at 9. Officer Keenan observed a 2003 black Crown Victoria and put on her lights and sirens. The driver of the vehicle initially ignored her signals. ***Id.*** at 11. One block later, the driver stopped in front of the house to which the vehicle was registered. ***Id.*** at 12.
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> [Appellant] was operating the vehicle and the owner of the vehicle was sitting in the passenger seat. ***Id.*** at 13. Officer

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* Retired Senior Judge assigned to the Superior Court.

> Keenan took [Appellant] out of the vehicle by opening the door and pulling him out, patted him down, and found an unopened bottle of Heineken in his pocket. ***Id.*** at 14. Officer Keenan noted that [Appellant] was a little disheveled, had glassy eyes, and had an odor of alcohol on his breath. ***Id.*** at 15.
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> Officer Keenan has been a police officer for fourteen years and has made approximately fifteen arrests for DUI a year. ***Id.*** at 16. Officer Keenan, based on her experience, concluded that [Appellant] was under the influence of alcohol. Officer Keenan also concluded that [Appellant] was not capable of safely operating a vehicle because the vehicle did not respond when Officer Keenan put on her lights and siren. ***Id.***
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> Officer Keenan observed empty beer bottles in the back seat of the car. Officer Keenan towed and impounded ("live-stopped") the vehicle after she ran [Appellant's] license through NCIC. ***Id.*** at 20.
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> The Commonwealth's next witness was Officer John Zirilli, of the accident investigation unit of the Philadelphia Police Department. He has been an officer in that unit for ten years and processed about one thousand defendants charged with DUI. ***Id.*** at 25-26. Officer Zirilli came into contact with [Appellant] on January 27, 2010 at 11:00 A.M. Officer Zirilli performed the normal procedure for DUI testing: he had [Appellant] sit approximately three feet from him, he engaged [Appellant] in a conversation, and then read [Appellant] his ***O'Connell*** warnings[, ***see Commonwealth v. O'Connell***, 555 A.2d 873 (Pa. 1989) (requiring notice to a driver arrested for DUI that failure to submit to breathalyzer results in a mandatory one-year license suspension and that he is not entitled to attorney before deciding whether to submit to testing)] and advised him about the ramifications of refusing the breathalyzer test. [Appellant] signed the ***O'Connell*** warnings paperwork, signed the paperwork for the breathalyzer test, but then refused to take the test. N.T. at 26-27. Officer Zirilli observed that [Appellant] had red, bloodshot, watery eyes, had a moderate smell of alcohol on his breath and that [Appellant] indicated that he did not want to take the breathalyzer because he was the passenger in the car. ***Id.*** at 30.

Trial Court Opinion ("T.C.O."), 5/17/2012, at 1-2 (citations modified).

As noted, at the close of the bench trial, Appellant was convicted of DUI under subsection 3802(a)(1) ("General impairment") of the Vehicle Code and sentenced. Appellant filed a notice of appeal and the trial court ordered Appellant to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant complied, and the trial court prepared an opinion pursuant to Rule 1925(a).

On appeal, Appellant raises the following question for our consideration: "Was not the evidence insufficient as a matter of law to sustain [Appellant's] conviction for 75 Pa.C.S. § 3802(a)(1) where the Commonwealth failed to prove that [Appellant] imbibed a sufficient amount of alcohol such that he was rendered incapable of safely driving within the meaning of the Vehicle Code." Brief for Appellant at 3.

Appellant presents a challenge to the sufficiency of the evidence to sustain his conviction.

> Our standard of review in a challenge to the sufficiency of the evidence requires that we consider the evidence admitted at trial in a light most favorable to the Commonwealth as the verdict-winner, and grant the Commonwealth all reasonable inferences that can be derived from the admitted evidence. We will deem the evidence legally sufficient only if it proves, beyond a reasonable doubt, each element of the offense charged.

Commonwealth v. Griffith, 32 A.3d 1231, 1240 n.7 (Pa. 2011). "The Commonwealth may sustain its burden of proof by wholly circumstantial evidence." ***Commonwealth v. Segida***, 985 A.2d 871, 880 (Pa. 2009).

> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all,

> part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Mobley, 14 A.3d 887, 889-90 (Pa. Super. 2011) (quoting ***Commonwealth v. Mollett***, 5 A.3d 291, 313 (Pa. Super. 2010)).

Subsection 3802(a)(1) provides as follows: "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. § 3802(a)(1). This statutory provision does not require proof of a particular blood alcohol content; it requires only the consumption of alcohol to an extent that renders the driver unable to drive safely. This Court has held that, to establish sufficient impairment, the Commonwealth need not establish "some extreme condition of disability." ***Commonwealth v. Kerry***, 906 A.2d 1237, 1241 (Pa. 2006). Sufficient impairment, rather, inheres when the operator of a vehicle suffers "a diminution or enfeeblement in the ability to exercise judgment, to deliberate or to react prudently to changing circumstances and conditions." ***Id.***

The trial court in this case found that the evidence was sufficient to sustain Appellant's conviction. Crediting Officer Keenan's testimony, the trial

court noted that Appellant failed to respond at first when Officer Keenan activated her lights and siren to initiate the traffic stop, notwithstanding that there were opportunities for Appellant to pull over safely. Instead, Appellant continued to drive for approximately a block until he reached his passenger's home. After approaching the vehicle, Officer Keenan pulled Appellant out of the vehicle and patted him down. T.C.O. at 1. Officer Keenan found an unopened beer bottle in Appellant's pocket, and empty beer bottles in the rear of the car. Appellant was disheveled and glassy-eyed. Appellant slurred his speech and smelled of alcohol. ***Id.*** at 2. Indeed, Officer Keenan described Appellant as "stuporous in as far as responding" to Officer Keenan and the back-up officer. N.T. at 15.

Officer Zirilli corroborated Officer Keenan in all relevant particulars. Officer Zirilli testified that he was a ten-year veteran of the Philadelphia Police Department's Accident Investigation Division ("AID"). He testified that the AID "handle[s] all car crashes . . . [and processes] all the DUIs in the city and county of Philadelphia." N.T. at 25. Officer Zirilli testified that, in that capacity, he had processed approximately one thousand DUIs. ***Id.*** at 26. As part of the DUI processing procedure, Officer Zirilli testified, he has a suspect "sit approximately 3 feet from [him]. [He] engage[s] him in a conversation. [He'll] ask [the suspect] his name; date of birth; address; if he has a driver's license . . . ." ***Id.*** Officer Zirilli testified that Appellant initially agreed to submit to breathalyzer testing, but then refused. ***Id.*** at 27. He testified that Appellant appeared before him with "red, bloodshot,

watery eyes, [and a] smell of alcohol on his breath. And [Appellant] stated that he was the passenger that day; that's why he didn't want to take the test." ***Id.*** at 30.

Appellant does not dispute that the evidence was sufficient to establish that he had consumed alcohol on the night in question. Rather, he challenges the sufficiency of the evidence to establish that he was incapable of driving safely. He emphasizes the absence of testimony to the effect that he engaged in erratic driving or otherwise gave Officer Keenan reason to believe that his judgment was impaired. He contends that there was no evidence that he was not in control of his physical faculties; in particular, he notes that he did not fail a field sobriety test. Brief for Appellant at 8-9.

Appellant rejects the trial court's sole reliance upon ***Mobley***, *supra*. As in this case, the ***Mobley*** appellant did not contest that he was in physical control of the vehicle and that he had consumed alcohol before driving. He challenged only the sufficiency of the evidence to establish his inability to operate the vehicle safely. 14 A.3d at 890.

The trial court relied upon ***Mobley*** principally in rejecting Appellant's emphasis on the fact that Officer Keenan did not observe Appellant driving erratically prior to executing the traffic stop. T.C.O. at 4. To that extent, the trial court's citation was appropriate: In ***Mobley***, this Court held that "[e]vidence of erratic driving is not a necessary precursor to a finding of guilt under" section 3802(a)(1). 14 A.3d at 890. However, in finding the evidence sufficient in that case, we emphasized that appellant went zero for

four in field sobriety tests, and enumerated the officer's observations of numerous other signs of substantial intoxication. ***Id.*** Thus, we agree with Appellant that ***Mobley*** does not control our assessment of the sufficiency of the evidence in this case. However, ***Mobley*** does establish that the absence of observations of erratic driving in this case does not require, without more, a ruling in Appellant's favor.

Appellant contends that, in upholding convictions for DUI under section 3802(a)(1), this Court "has relied, at least in part, on evidence that either the driver engaged in activities which indicated a serious lapse in judgment or the driver exhibited an inability to control basic motor functions." Brief for Appellant at 10. In support of this argument, Appellant cites ***Kerry***, 906 A.2d 1237, ***Commonwealth v. Hartle***, 894 A.2d 800 (Pa. Super. 2006), and ***Commonwealth v. Butler***, 856 A.2d 131 (Pa. Super. 2004).

In the cases cited by Appellant, law enforcement officers indeed observed more compelling evidence of impairment than Officers Keenan and Zirilli observed in this case. In ***Kerry***, the appellant was found illegally operating an all-terrain vehicle on a snow-covered highway, with four cans of beer secreted on his person. As well, the appellant had bloodshot eyes, smelled of alcohol, and his speech was slurred. 906 A.2d at 1241. In ***Hartle***, the appellant's breath emanated a strong odor of alcohol, his eyes were bloodshot and glassy, and he kept repeating himself. As well, he declined to perform a field sobriety test on the basis that he had a back injury. The appellant in ***Hartle*** also "sway[ed] in a circular motion" and

refused to take a breathalyzer test. 894 A.2d at 804. In ***Butler***, the appellant was observed traveling at a high rate of speed, weaving in and out of traffic, and driving up onto a concrete median. He also drove for nine blocks after the arresting officer activated her lights before pulling over. The appellant smelled of alcohol, had bloodshot eyes, slurred speech, "and an overall inability to stand up." 856 A.2d at 136-37.

That they are distinguishable in certain particulars, however, does not mean that these cases have nothing to offer our analysis in this case. In both ***Kerry*** and ***Hartle***, for example, this Court noted among factors establishing the sufficiency of the evidence that the appellant had declined to take a breathalyzer test, as in this case. Moreover, as in ***Kerry***, Appellant in this case was found with an unopened beer on his person. In this case, moreover, Officer Keenan observed approximately six empty beer bottles on the floor below the back seat of the vehicle.

That Appellant has identified cases in which a greater quantum of evidence was identified as establishing the sufficiency of the evidence to support a conviction for DUI is only half of Appellant's battle. It should go without saying that there are hundreds, if not thousands, of Pennsylvania cases that affirm DUI convictions based upon more evidence of impairment than is present in this case. But this alone does not establish that the trial court lacked a sufficient basis upon which to find a criminal degree of impairment beyond a reasonable doubt.

Our own research has revealed scant case law involving facts similar to these, and the Commonwealth, in an otherwise thorough brief, fails to direct us to any on-point Pennsylvania precedent. Thus, we must acknowledge that this presents a close case. Certainly nothing in our case law suggests that the mere fact that the consumption of alcohol before driving suffices to establish such impairment as the statute requires to find one guilty of DUI under subsection 3802(a)(1). However, neither does our case law require that the Commonwealth provide proof of erratic driving to sustain a conviction for DUI (general impairment). ***See Mobley***, *supra*.

Reviewing Officers Keenan's and Zirilli's observations under our deferent standard of review, we cannot conclude that the trial court erred or abused its discretion. Officer Keenan testified that Appellant failed to yield to her signal in a timely way, that he was "stuporous" upon the traffic stop, that he slurred his speech, that his eyes were glassy, and that he smelled of alcohol. She found an unopened bottle of beer in Appellant's pocket and a half-dozen empty beer bottles behind Appellant's seat. Moreover, Appellant admitted that he had consumed alcohol before driving, despite the fact that he was pulled over at 9:50 A.M., the timing itself comprising a suggestive aspect of the circumstances when paired with the beer bottle found in Appellant's jacket and the empties found in the back seat area.

Officer Zirilli corroborated Officer Keenan's testimony regarding the odor, appearance, and behavior of Appellant, which Officer Zirilli observed at a distance of approximately three feet in a controlled setting over an hour

later.[1] Officer Zirilli also testified that Appellant refused to submit to a breathalyzer test based upon Appellant's claim that he was a passenger in the vehicle rather than the driver. The trial court understandably might have found this probative of consciousness of guilt, a troubling degree of disorientation and impairment, or both.

We must view the evidence in the light most favorable to the Commonwealth as verdict-winner. Taken collectively and in light of the officers' considerable experience with DUI cases, the evidence in this case, while perhaps less than compelling, furnished the trial court with an adequate evidentiary basis for finding beyond a reasonable doubt that Appellant was "rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle." 75 Pa.C.S. § 3802(a)(1). Consequently, Appellant is entitled to no relief.

Judgment of sentence affirmed. Jurisdiction relinquished.

Olson, J., concurs in the result.

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[1] ***See*** N.T. at 26 (testifying that he came into contact with Appellant at approximately 11:00 A.M., over an hour after Officer Keenan stopped Appellant).

Judgment Entered.

Prothonotary

Date: 6/5/2013