

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

WILLIAM R. FAVINGER III,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Nos. 1678 MDA 2013

Appeal from the Judgment of Sentence entered May 30, 2012,  
in the Court of Common Pleas of Lebanon County,  
Criminal Division, at No(s): CP-38-CR-0000388-2011

BEFORE: GANTMAN, P.J., ALLEN, and LAZARUS, JJ.

MEMORANDUM BY ALLEN, J.:

**FILED MARCH 18, 2014**

William R. Favinger ("Appellant") appeals from the judgment of sentence entered after the trial court convicted him of driving under the influence ("DUI") (general impairment), DUI (high rate of alcohol), driving on roadways laned for traffic, duty of driver on approach of emergency vehicle, and careless driving.<sup>1</sup>

The trial court summarized the pertinent facts as follows:

On January 29, 2011, Trooper Michael Spada observed [Appellant] driving in the center of Werners Road. Trooper Spada turned onto Werners Road, in an effort to catch up to [Appellant's] vehicle, and noticed that [Appellant's] vehicle continued to travel in the center of the roadway. Werners Road is a roadway divided by a single solid yellow

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<sup>1</sup> 75 Pa.C.S.A §§ 3802(a)(1) and (b), 3309(1), 3325(a) and 3714(a).

line, and on this particular night, there were snow banks on both sides of the road.

Trooper Spada activated his emergency lights in an attempt to initiate a traffic stop. Despite the activated lights, [Appellant] travelled approximately one half mile before pulling into a driveway. As Trooper Spada made contact with [Appellant], he noticed an odor of alcoholic beverage emanating from [Appellant]. In addition, Trooper Spada observed that [Appellant's] eyes were bloodshot and glassy. [Appellant] agreed to perform field sobriety tests, which Trooper Spada concluded that he failed. As a result, [Appellant] was taken into custody for DUI and transported to the Jonestown PSP Barracks for a breath test. [Appellant] consented to a breath test, which produced a BAC of .128%.

Trial Court Opinion, 11/14/13, at 3-4.

Appellant was subsequently arrested and charged with the aforementioned crimes. Appellant filed a pre-trial suppression motion, which the trial court denied on January 11, 2012. A bench trial commenced on March 12, 2012, at the conclusion of which the trial court entered its guilty verdicts. Following a hearing on May 30, 2012, the trial court sentenced Appellant to sixty days to six months of imprisonment. Appellant filed a post-sentence motion on June 11, 2012, which the trial court denied on October 9, 2012. Appellant filed a notice of appeal on December 10, 2012. After the appeal was quashed as untimely, Appellant's counsel filed a motion for allowance to appeal *nunc pro tunc*, which the trial court granted. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues for our review:

- I. Whether the Trial Court's finding of guilt as to Driving Under the Influence High Rate of Alcohol was supported by sufficient evidence because a valid 20 minute period of observation was not performed.
- II. Whether the Trial Court's finding of guilt as to Driving Under the Influence General Impairment was supported by sufficient evidence where the field sobriety tests were performed on a snow covered driveway and there were minimal other indicators of impairment.
- III. Whether the Trial Court's finding of guilt as to Driving Under the Influence High Rate of Alcohol was against the weight of the evidence.
- IV. Whether the Trial Court's finding of guilt as to Driving Under the Influence General Impairment was against the weight of the evidence where the field sobriety tests were performed on a snow covered driveway and there were minimal other indicators of impairment.
- V. Whether the Trial Court erred by Denying the Appellant's Motion to Suppress because of an invalid motor vehicle stop. More specifically, whether the trial court erred because any deviation from the lane of travel was momentary and minor in nature.
- VI. Whether the Trial Court erred by Denying the Appellant's Motion to Suppress because of a lack of probable cause to arrest where the field sobriety tests were performed on a snow covered driveway and there were minimal other indicators of impairment.

Appellant's Brief at 5.

In his first two issues, Appellant argues that the evidence was insufficient to support his convictions for driving under the influence. When

reviewing a challenge to the sufficiency of the evidence, we are bound by the following:

We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.

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. Tarrach***, 42 A.3d 342, 345 (Pa. Super. 2012).

Appellant argues that the evidence was insufficient to support his convictions for driving under the influence. Appellant was found to have violated 75 Pa.C.S.A. § 3802(a)(1), which provides:

**Driving under influence of alcohol or controlled substance**

(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.

To support a conviction for driving under the influence (general impairment) under Section 3802(a)(1), the Commonwealth must demonstrate the following:

[S]ubsection 3802(a)(1) is an 'at the time of driving' offense, requiring that the Commonwealth prove the following elements: the accused was driving, operating, or in actual physical control of the movement of a vehicle during the time when he or she was rendered incapable of safely doing so due to the consumption of alcohol. ...

Section 3802(a)(1) ... is a general provision and provides no specific restraint upon the Commonwealth in the manner in which it may prove that an accused operated a vehicle under the influence of alcohol to a degree which rendered him incapable of safe driving. ... The types of evidence that the Commonwealth may proffer in a subsection 3802(a)(1) prosecution include but are not limited to, the following: the offender's actions and behavior, including manner of driving and ability to pass field sobriety tests; demeanor, including toward the investigating officer; physical appearance, particularly bloodshot eyes and other physical signs of intoxication; odor of alcohol, and slurred speech. Blood alcohol level may be added to this list, although it is not necessary and the two hour time limit for measuring blood alcohol level does not apply. ... The weight to be assigned these various types of evidence presents a question for the fact-finder, who may rely on his or her experience, common sense, and/or expert testimony. Regardless of the type of evidence that the Commonwealth proffers to support its case, the focus of subsection 3802(a)(1) remains on the inability of the individual to drive safely due to consumption of alcohol-not on a particular blood alcohol level.

***Commonwealth v. Teems***, 74 A.3d 142, 145 (Pa. Super. 2013) (internal quotations omitted) *citing* ***Commonwealth v. Segida***, 985 A.2d 871, 879 (Pa. 2009).

Appellant argues that the evidence was insufficient to support his conviction because the Commonwealth failed to present any evidence that Appellant had slurred speech, poor balance, or diminished mental faculties. Appellant's Brief at 16-17. Appellant asserts that aside from the field sobriety tests, the odor of alcohol, and Appellant's bloodshot eyes, Corporal Spada did not testify that Appellant exhibited any other physical signs of impairment. *Id.* Appellant argues that because the field sobriety tests were performed on a snow-covered driveway, the weather conditions, and not intoxication, caused him to fail the field sobriety tests, and that the remaining evidence could not support his conviction. *Id.* The trial court disagreed, and explained:

Corporal Spada first observed the Appellant driving in the center of the road, unable to maintain his own lane. Corporal Spada smelled an odor of alcohol when approaching Appellant's vehicle, and Appellant admitted to drinking "a few" beverages. Corporal Spada observed that Appellant's eyes were bloodshot and glassy. Corporal Spada testified that Appellant failed the field sobriety tests. While Appellant alleges the conditions were not appropriate to conduct field sobriety tests ... the errors [Appellant] made were determined to not be the result of the conditions. Appellant began a test too soon, missed a heel to toe, stepped off the line, and had noticeable swerving during the one-leg-stand test. Appellant never complained the conditions made it impossible to take the test.

Trial Court Opinion, 11/14/13, at 9-10.

We agree with the trial court that the evidence was sufficient to support Appellant's conviction for DUI under § 3802(a)(1). Corporal Spada testified that over eighteen years, he had made hundreds of DUI arrests.

N.T., 3/12/21, at 7. He testified that when he encountered Appellant, he detected the “strong” odor of alcohol, and Appellant’s eyes were “bloodshot and glassy.” *Id.* at 8-9. While Corporal Spada testified that there was snow on the ground at the time Appellant performed the field sobriety tests, he stated that the snow was “compacted ... [while] I was out there on my feet, I wasn’t slipping ... I didn’t observe [Appellant] to have any problem ... slipping.” *Id.* Corporal Spada further testified that if he thought it would have been difficult to conduct the field sobriety tests due to the snow, he would not have conducted them, or would have transported Appellant to a safer location. *Id.* Additionally, Corporal Spada testified that he was able to demonstrate the “walk and turn” test to Appellant, despite the snow on the ground. *Id.* Based on the foregoing, we conclude that the evidence, viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to support Appellant’s § 3802(a) conviction.

Appellant additionally challenges the sufficiency of the evidence with respect to his conviction for violating 75 Pa.C.S.A. § 3802(b), which provides:

- (b) **High rate of alcohol.**--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 0.10% but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

Thus, to sustain a conviction for DUI (high rate of alcohol), the Commonwealth must demonstrate the following: (1) Appellant was driving, operating, or in actual physical control of the movement of a vehicle; and (2) Appellant's BAC was at least 0.10% but less than 0.16% within two hours of driving, operating, or being in control of the vehicle. 75 Pa.C.S.A. § 3802(b).

Appellant argues that the evidence was insufficient to support his § 3802(b) conviction because the breath test performed by Corporal Spada did not conform to the requirements of 67 Pa. Code § 77.24, which requires the suspected impaired driver to be observed for at least 20 minutes before the administration of the first breath test.<sup>2</sup> Appellant's Brief at 14-15. Appellant argues that the facts of record demonstrate that an insufficient interval of time elapsed between the traffic stop and the administration of the breath tests, to have allowed Corporal Spada to observe Appellant for the required

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<sup>2</sup> 67 Pa.Code 77.24. Breath test procedures.

**(a) Observation.** The person to be tested with breath test equipment shall be kept under observation by a police officer or certified breath test operator for at least 20 consecutive minutes immediately prior to administration of the first alcohol breath test given to the person, during which time the person may not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten or smoked. Custody of the person may be transferred to another officer or certified breath test operator during the 20 consecutive minutes or longer period as long as the person to be tested is under observation for at least 20 consecutive minutes prior to initial administration of the alcohol breath test.



20-minute period. Appellant argues therefore that the breath test was defective, that the Commonwealth failed to demonstrate each material element of the DUI, and the evidence was insufficient to support his conviction.

We disagree with Appellant's contention that the breath test was defective and that the Commonwealth failed to demonstrate every element of the crime. Our review of the record reveals that the traffic stop occurred around 3:20 a.m., after which Corporal Spada performed field sobriety tests and then transported Appellant to the police barracks, approximately five minutes away. N.T., 3/12/12, at 4, 35. Once at the police barracks, Corporal Spada began the 20-minute observation period at 3:50 a.m. A first breath test was administered at 4:11 a.m., which failed to yield an adequate sample. *Id.* at 18. A second test was conducted at 4:16 a.m., which yielded a BAC of .128%, and a third test yielded a BAC of .131%. *Id.* at 20. The Commonwealth additionally presented the Pennsylvania State Police breath test operation log, which contained printouts from the breath tests Corporal Spada performed on Appellant, substantiating the corporal's testimony. *Id.* at 14-15.

Based on the foregoing evidence, we find no error in the trial court's determination that the Commonwealth presented sufficient evidence to demonstrate that the Commonwealth complied with the 20-minute observation period required by 67 Pa. Code § 77.24. The traffic stop

occurred at 3:20 a.m. and at 3:50 a.m., approximately thirty minutes after the stop, Corporal Spada began the 20-minute observation of Appellant which concluded at approximately 4:10 a.m. As the trial court observed, although Appellant "makes a bald assertion that based on the timeline of events, the observation period could not have started at 3:50 a.m., and therefore twenty (20) minutes did not pass before the breath test ... there was no evidence to contradict the Corporal's log [which indicates] the twenty (20) minute observation period was followed and the sample is sufficient." Trial Court Opinion, 11/14/13, at 7. Upon review, we conclude the facts of record support the trial court's determination that the evidence was sufficient to support Appellant's conviction.

In his third and fourth issues, Appellant argues that his DUI convictions were against the weight of the evidence. Appellant's Brief at 17-21. Our scrutiny of whether a verdict is against the weight of the evidence is governed by the principles set forth in ***Commonwealth v. Champney***, 832 A.2d 403 (Pa. 2003):

The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice.

Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether

the trial court palpably abused its discretion in ruling on the weight claim.

**Champney**, 832 A.2d at 408 (citations omitted).

Appellant's weight of the evidence claims are based on the same arguments raised in his sufficiency challenges, i.e., that Corporal Spada's testimony about Appellant's intoxicated condition was inadequate to support Appellant's conviction for DUI (general impairment), and that Corporal Spada's testimony regarding his administration of the breath test did not demonstrate the required 20-minute observation period before the breath test, and therefore the results of the breath test were not accurate and of inadequate weight to support Appellant's conviction for DUI (high rate of alcohol).

The trial court, however, found no merit to Appellant's weight of the evidence challenges, explaining: "[g]iven the fact that the chemical breath test results are valid and Corporal Spada's testimony credible, we cannot agree with Appellant. ... We considered Appellant's admission to consuming alcohol and Corporal Spada's testimony regarding Appellant's erratic driving and failure to stop upon signal from Corporal Spada, his inability to pass field sobriety tests, the odor of alcohol, and his bloodshot eyes. Considering all of the evidence presented, we do not find that the verdict is so contrary to the evidence as to shock one's sense of justice." Trial Court Opinion, 11/14/13, at 10-11. The trial court expressly found credible Corporal Spada's testimony about the events surrounding the traffic stop and

Appellant's subsequent arrest. Such credibility determinations are exclusively for the finder of fact, and we will not disturb them on appeal. ***Champney, supra***. We thus find no abuse of discretion in the trial court's rejection of Appellant's weight claims.

In his final two issues, Appellant challenges the trial court's denial of his suppression motion. Appellant's Brief at 22-28. Our scope and standard of review of such claims is well-settled:

An appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. [Because] the prosecution prevailed in the suppression court, we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

***Commonwealth v. Reese***, 31 A.3d 708, 721 (Pa. Super. 2011) (citations omitted).

Appellant takes issue with Corporal Spada's stop of Appellant for violating § 3309 of the Vehicle Code, which provides that a vehicle should be driven "as nearly as practicable" within a single lane of traffic. Appellant's Brief at 22-25. Appellant contends that while Corporal Spada testified that he observed Appellant traveling in the middle of the road, the video footage of the encounter is inconclusive as to Appellant's position in the roadway. *Id.* at 25. Moreover, Appellant claims that given the snow banks on either

side of the road, Appellant maintained his lane of travel “as nearly as practicable”, and did not present a safety risk to other motorists. *Id.* Accordingly, Appellant contends that Corporal Spada lacked requisite probable cause to stop Appellant, and the traffic stop was improper. Appellant’s Brief at 22-25. We disagree.

A police officer has the authority to stop a vehicle when he or she has reasonable suspicion that a violation of the vehicle code has taken place, for the purpose of obtaining necessary information to enforce the provisions of the code. 75 Pa.C.S. § 6308(b). However, if the violation is such that it requires no additional investigation, the officer must have probable cause to initiate the stop. ***Commonwealth v. Feczko***, 10 A.3d 1285, 1291 (Pa. Super. 2010).

Put another way, if the officer has a legitimate expectation of investigatory results, the existence of reasonable suspicion will allow the stop—if the officer has no such expectations of learning additional relevant information concerning the suspected criminal activity, the stop cannot be constitutionally permitted on the basis of mere suspicion. ***Commonwealth v. Chase***, 599 Pa. 80, 960 A.2d 108, 115 (2008).

***Commonwealth v. Brown***, 64 A.3d 1101, 1105 (Pa. Super. 2013).

Because the offense in this case, failure to maintain traffic lanes, was not investigable, probable cause was required for the stop to be constitutionally valid. “The police have probable cause where the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed. We evaluate probable cause by considering all relevant

facts under a totality of circumstances analysis.” ***Commonwealth v. Hernandez***, 935 A.2d 1275, 1284 (Pa. 2007) (citations omitted).

Here, the trial court concluded that Corporal Spada possessed the requisite probable cause to effectuate the stop. The trial court explained:

Corporal Spada possessed probable cause to initiate a traffic stop. [The trial court] reviewed the dash camera video, but it was very difficult to see from the video the distance that Appellant’s vehicle was traveling over the middle of the line. Thus, [the trial court] relied on the testimony provided ... at the Pretrial Hearing. Corporal Spada testified that Appellant drove down the center line of Werners Road for a substantial distance. According to Corporal Spada, Appellant’s vehicle was in the middle of the road when he entered a blind curve; thus, Appellant would not have been able to see oncoming traffic. The video corroborates Corporal Spada’s testimony because the road Appellant was driving on had a blind curve. Driving in the middle of the road for a substantial distance, especially where there is a blind curve, certainly presents a safety issue in violation of Section 3309.

Trial Court Opinion, 11/14/13, at 12.

Upon review, we conclude that the trial court’s factual findings are supported by the record. Corporal Spada presented uncontradicted testimony, which the trial court found credible, that Appellant was driving in the middle of the road. See N.T., 9/21/11, at 4-5. We may not reassess the trial court’s credibility determinations. Moreover, there was no testimony indicating that the snow banks on the roadside prevented Appellant from staying in his traffic lane. Accordingly, we find no error in the trial court’s determination that Corporal Spada possessed the requisite probable cause to initiate a traffic stop pursuant to § 3309.

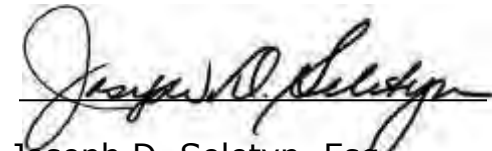
Appellant additionally argues that Corporal Spada lacked probable cause to arrest him after conducting field sobriety tests. Appellant's Brief at 26-28. Appellant claims that given that the ground was snow-covered, Corporal Spada could not have known whether the weather conditions or intoxication caused Appellant to fail the field sobriety tests. Under these circumstances, Appellant argues that Corporal Spada could not have developed the requisite probable cause to believe Appellant was intoxicated. We find no merit to this claim. At the suppression hearing, Corporal Spada explained: "While I was giving [Appellant] this [walk-and-turn field sobriety test] I had to demonstrate the test myself. I did not slip. If I had slipped I would not have had him perform the test. If while performing the test I noticed ... that he slipped, that his feet would have slipped out from underneath him ... or he would have explained to me this is too slippery, I would not have had him perform those tests." N.T., 9/21/11, at 24. The trial court found credible the testimony of Corporal Spada that the weather conditions did not preclude Appellant from successfully completing the field sobriety tests. Moreover, as the trial court explained, "Corporal Spada smelled an odor of alcohol when approaching Appellant's vehicle, and Appellant admitted to drinking 'a few' beverages. Corporal Spada observed that Appellant's eyes were bloodshot and glassy. Corporal Spada testified that Appellant failed the field sobriety tests. [D]etection of odor of alcohol on a driver's breath and subsequent failure of field sobriety tests are

sufficient to establish probable cause for an arrest. Accordingly ... the arrest was proper in this case.” Trial Court Opinion, 11/14/13, at 14. Again, our review of the record supports the trial court’s determination, and we find no error in the trial court’s finding of probable cause and denial of Appellant’s suppression motion.

For the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 3/18/2014