NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
EMILIO CORTEZ III, Appellant	:	No. 186 MDA 2012

Appeal from the Judgment of Sentence September 21, 2011
In the Court of Common Pleas of Lebanon County
Criminal Division No(s).: CP-38-CR-0001560-2010

BEFORE: OLSON, OTT, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: February 19, 2013

Appellant, Emilio Cortez, III, appeals from the judgment of sentence entered in the Lebanon County Court of Common Pleas. Appellant argues the trial court erred in admitting evidence of his blood alcohol content ("BAC") because there was no testimony that a conversion factor was used. Appellant avers the court also erred in denying his motion to suppress because there was no probable cause to believe that a motor vehicle violation occurred. We affirm the judgment of sentence for driving under the influence ("DUI")—general impairment under 75 Pa.C.S. § 3802(a)(1), and disorderly conduct with a motor vehicle in violation of Lebanon City Ordinance 705.01(g). We vacate the judgment of sentence for the

* Former Justice specially assigned to the Superior Court.

conviction of DUI—high rate of alcohol, under 75 Pa.C.S. § 3802(b). We remand for resentencing.

The trial court summarized the facts of the case as follows:

> On July 30, 2010, Officer John Allen observed [Appellant's] vehicle stopped at a red light at the intersection of Tenth and Lehman Streets. While stopped at the red light, [Appellant] revved his engine to the point that the RPM limiter on the engine was engaged. As the light turned green, [Appellant] dumped his clutch and spun his tires.
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> Officer Allen conducted a traffic stop on [Appellant's] vehicle in the 1000 block of Lehman Street. As Officer Allen approached the vehicle, he smelled an odor of alcohol emanating from [Appellant's] breath and observed that [Appellant] had bloodshot eyes, slurred speech and difficulty retrieving paperwork from his vehicle. When asked if he had anything to drink that evening, [Appellant] responded with "evidently not enough."
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> Officer Allen asked [Appellant] to perform field sobriety tests. . . . [A]s he was given instructions for the one leg stand test, [Appellant] repeatedly tried to conduct the test. After the instructions were completed, [Appellant] attempted to perform the test but lost his balance at the count of seven (7). . . .
>
> The second test [Appellant] was asked to perform was the walk and turn test. . . . [Appellant] was "out of step" (i.e. not putting his feet toe to heel) on several steps and failed to count his steps while conducting the test. . . .
>
> Based on [Appellant's] odor of alcohol, bloodshot eyes, speech and performance on the field sobriety tests, Officer Allen concluded that [Appellant] was unable to safely operate his vehicle. [Appellant] was placed in custody and taken to Good Samaritan Hospital ("GSH") where [Appellant] consented to a blood test. The blood test results showed a BAC if 0.157%, reported as a whole blood result.

Trial Ct. Op., 12/30/11, at 3-4 (citations omitted). Appellant was charged with DUI in violation of 75 Pa.C.S. §§ 3802(a)(1) and (b), and disorderly conduct with a motor vehicle in violation of Lebanon City Ordinance 705.01(g). Following a bench trial on June 24, 2011, Appellant was found guilty of the aforementioned charges and not guilty of racing on highways. The DUI sentences merged. He was sentenced for the DUI convictions as follows:

> [Appellant] shall pay the costs of prosecution, pay a fine of $500.00 and undergo imprisonment in the Lebanon County Correctional Facility for an indeterminate period, the minimum of which shall be forty-eight (48) hours, the maximum of which shall be six(6) months.

Order, 9/21/11, at 1. He was ordered to pay costs and a $50 fine for disorderly conduct. ***Id.*** Appellant filed a post-sentence motion which was denied.

This timely appeal followed. Appellant filed a timely Pa.R.A.P. 1925(b) statement of errors complained of on appeal and the trial court filed an opinion incorporating its orders and opinions dated March 9, 2011[1] and December 30, 2011.

Appellant raises the following issues for our review:

> 1. Whether the Trial Court erred in admitting evidence of Appellant's alleged blood alcohol concentration where the test introduced by the Commonwealth was not performed

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[1] The March 9, 2011 opinion was filed in response to Appellant's Omnibus Pre-Trial Motion to Suppress Evidence and Dismiss Charges. The December 30, 2011 opinion was filed in response to Appellant's Post-Sentence Motion.

> on whole blood, the Commonwealth failed to present testimony that a conversion factor was used or if one was used, failed to present testimony that the conversion factor utilized to convert the supernatant alcohol analysis to a correlative whole blood result was one that was generally accepted in the scientific community?
>
> 2. Whether the trial court erred in denying Appellant's Motion for Suppression of Evidence regarding the alleged illegal traffic stop of his vehicle as the officer was without probable cause or reasonable suspicion[2] to believe a violation had been committed?

Appellant's Brief at 1.

First, Appellant argues that the court erred in admitting evidence of his BAC because the test was not performed on whole blood and the Commonwealth failed to present testimony that a conversion factor was used. Appellant claims that because the BAC test was not performed on whole blood, the Commonwealth failed to present sufficient evidence for the DUI—high rate of alcohol conviction. We agree.

This Court set forth the standard of review for a challenge to the sufficiency of the evidence:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances

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[2] Although Appellant phrases the issue in the alternative in the statement of the issues, he argues that probable cause was required to lawfully stop his vehicle.

> established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder 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. Karns, 50 A.3d 158, 161 (Pa. Super. 2012) (citation omitted).

The DUI—high rate of alcohol subsection provides:

> 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.

75 Pa.C.S. § 3802(b).

This Court in ***Karns*** explained:

> With respect to the BAC requirements, this Court recently stated:
>
>> The general rule for alcohol related DUIs is that only tests performed on whole blood will sustain a conviction under Section 3802. Thus, evidence of blood serum, plasma or supernatant testing, without conversion, will not suffice. The reasoning for this rule rests on the distinction between whole blood and blood serum:

> The distinction between whole blood and blood serum is significant. Serum is acquired after a whole blood sample is centrifuged, which separates the [ ] blood cells and fibrin, the blood's clotting agent, from the plasma-the clear liquid i[n] the blood serum. When blood serum is tested the results will show a blood alcohol content which can range from between 10 to 20 percent higher than a test performed on whole blood. The reason for this is because the denser components of whole blood, the fibrin and corpuscles, have been separated and removed from the whole blood, leaving the less dense serum upon which the alcohol level test is performed. The value of the blood alcohol content in the serum is then determined. Because the serum is less dense than whole blood, the weight per volume of the alcohol in the serum will be greater than the weight per volume in the whole blood. Thus, an appropriate conversion factor is required to calculate the corresponding alcohol content in the original whole blood sample.

Karns, 50 A.3d at 161-62 (footnote and citations omitted).

In ***Karns***, the defendant's BAC result was based upon testing supernatant. ***Id.*** at 164. This Court agreed with the defendant's claim that "the Commonwealth failed to present evidence of a conversion factor that is generally accepted in the scientific community." ***Id.*** This Court opined:

> Our review of Icke's [the medical lab scientist who analyzed the defendant's blood sample] testimony leads us to conclude that the Commonwealth failed to present evidence of a conversion factor that is generally accepted in the scientific community. As described above, Ickes testified that the machine performs the conversion, that she did not know how the machine does the conversion, that the calculation performed on the raw results has nothing to do with conversion, and that three was a dilution factor unrelated to conversion. Ickes' testimony

> never clearly identified what conversion factor was used with respect to [the defendant's] blood sample, or whether the conversion factor used was generally accepted in the scientific community. Thus, the evidence presented by the Commonwealth was insufficient, and [the defendant's] conviction for DUI—highest rate of alcohol cannot stand.

Id. at 164-65.

In the instant case, Antoinette Matiskelli, a technologist employed by GSH, testified about the procedure for testing blood to arrive at a whole blood result:

> Once you verify both seals are intact and you verify the chain of custody form, we remove the caps. We label our centrifugation tube. We place one thousand tricholoroacetic acid or TCA in the centrifugation tube, make a 1 to thre[e] dilution of whole b[l]ood to thirty percent stock TCA. We then centrifuge for five minutes at 1300 rpm's.
>
> Once this is completed, we remove the specimen from centrifugation. We plug the identification number into the instrument. We do a sample supernatant. And perform the test.
>
> Once it is completed, the instrument will give a printout. It also sends the results directly to a computer system.
>
> At that point in time we review it on the computer screen. And in our lab system, it automatically calculates for the dilution factor, and we then proceed to release it into the system.

N.T., 6/24/11, at 54-55.

On cross-examination, Ms. Matiskelli testified:

> [Counsel for Appellant]: You are specifically responsible for the analysis of this specimen with respect to [Appellant's] blood alcohol content?

A: Yes.

Q: You were not specifically present for the blood collection of [Appellant]?

A. That's correct. I wasn't there.

Q: Now, as far as the protocols and procedures at Good Samaritan Hospital, their examinations are reviewed by a head pathologist; is that correct?

A: Yes.

* * *

Q: What specifically is TCA? What does that do with respect to a specimen?

A: Trichloroacetic acid. That is the extraction agent.

Q: What specifically does that do?

A: It binds it—binds with—with the presence in the cells after centrifucation.

Q: Now, the TCA is added to the specimen on 3 to 1 dilution?

A: That's correct.

Q: And this is again added to proteinase the blood specimen?

A: That's correct.

A: Once you add the TCA, this is formed at the bottom of the blood specimen?

A: The bottom of the centrifucation tube, yes.

* * *

Q: The bottom portion is completely discarded?

A: It's left intact in the bottom, yes.

Q: It's eventually discarded?

A: Yes.

* * *

Q: But there's not a whole blood annotation you can make?

A: It doesn't specify that way, no.

Q: After you put the top portion into the machine, the Dade Dimension spits out a number?

A: Yes.

Q: Now, you have no idea what mathematical procedure the Dade Dimension actually goes through to get to that specific number?

A: No, I don't actually—if it says it—I am not an expert there no.

* * *

Q: So because we're adding to TCA we then have to actually multiply by three to correct for the TCA?

A: Yes.

Q: But we're still only putting the supernatant in the date dimension to do the analysis?

A: That's correct.

Q: **You can't tell us anything about a conversion factor?**

A: **No.**

Id. at 71-76 (emphasis added).

In ***Karns***, this Court found the evidence was insufficient and that the conviction for DUI, highest rate of alcohol could not stand because the technologist could not explain how the machine performed the conversion, what conversion factor was used, or whether the conversion factor was generally accepted in the scientific community. ***Karns***, 50 A.3d at 164-65. Analogously, in the instant case, the technologist did not testify about the conversion factor. N.T. at 76. Therefore, the evidence presented by the Commonwealth was insufficient, and Appellant's conviction for DUI—high rate of alcohol cannot stand. ***See id.*** Accordingly, we vacate the conviction and remand for resentencing.

Lastly, Appellant avers the court erred in denying his motion to suppress evidence because the traffic stop of his vehicle was not based upon probable cause. Appellant's Brief at 31. Appellant argues that violation of Section 705.01(g) of the Lebanon County Ordinance "is a non-investigatable offence." ***Id.*** at 33. He avers that the officer did not have probable cause to stop the vehicle based on the disorderly conduct violation because "something more than a momentary squealing of tires and the revving of an engine is required." ***Id*** at 35.

In an appeal from a motion to suppress, our standard of review is as follows:

> We are limited to determining whether the lower court's factual findings are supported by the record and whether the legal conclusions drawn therefrom are correct. We may consider the evidence of the witnesses offered by the

> Commonwealth, as verdict winner, and only so much of the evidence presented by defense that is not contradicted when examined in the context of the record as a whole. We are bound by facts supported by the record and may reverse only if the legal conclusions reached by the court were erroneous.

Commonwealth v. Hilliar, 943 A.2d 984, 989 (Pa. Super. 2008) (citation omitted).

Section 705.01(g) provides:

> A person is guilty of disorderly conduct with a motor vehicle if, intending to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he/she drives any vehicle on the highways, roadways, traffic ways or parking lots within the City in a reckless or careless manner which endangers the safety or interferes with the comfort and convenience of persons using or residing on the thoroughfares of the City, deliberately squeals the tires of such vehicles, or laying of rubber by a vehicle, or intentionally increases the speed of the engine of such vehicle, thereby causing excessive noise without any legitimate purpose.

Lebanon City Ordinance § 705-01(g).[3]

This Court in ***Commonwealth v. Feczko***, 10 A.3d 1285 (Pa. Super. 2010) (*en banc*), *appeal denied*, 25 A.3d 327 (Pa. 2011) clarified the requisite

> quantum of cause necessary for an officer to stop a vehicle in this Commonwealth . . . notwithstanding any prior diversity on the issue among panels of this Court. Traffic

[3] We note that this ordinance is in the disjunctive. "Use of the word 'or' is 'disjunctive. It means one or the other of two or more alternatives.'" ***Weiley v. Albert Einstein Med. Ctr.***, 51 A.3d 202, 209 n.2 (Pa. Super. 2012) (citation omitted).

> stops based on a reasonable suspicion: either of criminal activity or a violation of the Motor Vehicle Code under the authority of Section 6308(b) must serve a stated investigatory purpose. In effect, the language of Section 6308(b)—"to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title"—is conceptually equivalent with the underlying purpose of a ***Terry*** [***v. Ohio***, 392 U.S. 1 (1968),] stop.
>
> Mere reasonable suspicion will not justify a vehicle stop when the driver's detention cannot serve an investigatory purpose relevant to the suspected violation. In such an instance, "it is encumbent [sic] upon the officer to articulate specific facts possessed by him, at the time of the questioned stop, **which would provide probable cause to believe that the vehicle or the driver was in violation of some provision of the Code.**"

Id. at 1291 (footnote and citations omitted). In ***Fezcko***, the analysis was limited to whether the traffic stop for violation of the Motor Vehicle Code was legal. ***Id.***

Instantly, Appellant claims that squealing of his tires did not establish probable cause to stop his vehicle for violation of Section 705.01(g). At the preliminary hearing,[4] Officer Allen testified in pertinent part as follows:

> [Officer] Allen: Well, I was sitting at the red light. I heard a, I heard the vehicle revving his engine excessively. Once the light turned green the vehicle squealed his tires in an excessive manner. . . .
>
> [Commonwealth]: When you're saying he squealed the tires, was it a little chirp or was it a long drawn out—

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[4] The parties relied upon the notes of testimony from the preliminary hearing, "[i]n lieu of a hearing" on the Omnibus Pre-Trial Motion to Suppress. Trial Ct. Op., 3/9/11, at 3.

> [A]:It was a long, long chirp, yes it was.
>
> * * *
>
> [Appellant's Counsel]: . . . And the squealing of the tires, how long would you say that lasted for?
>
> [A]: It lasted for a few, few seconds at least. It was, the engine was revved up to the point where the (inaudible) was engaging keeping the engine from pretty much blowing up.

N.T., 12/7/10, at 4-5, 24. Officer Allen testified that he was traveling east and Appellant was traveling west. ***Id.*** at 22. They were facing each other at the intersection. ***Id.***

At the trial,[5] Officer Allen testified, *inter alia*, as follows:

> [The Commonwealth]: . . . Were you in the area of 10th and Lehman Streets?
>
> A: Yes.
>
> Q: What were you doing?
>
> A: I was waiting at the red light on 10th Street facing east. . . .
>
> Q: Did you observe a vehicle in that area?
>
> A: Yes. I did.
>
> Q: What was that vehicle doing?

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[5] "Our courts have consistently adhered to the [principle] that an appellate court may consider **all** testimony on record in determining whether certain evidence [should have been suppressed], and not solely the testimony elicited during the suppression hearing." ***Commonwealth v. Williams***, 470 A.2d 1376, 1384 n.19 (Pa. Super. 1984).

> A: It was a black vehicle. While waiting at the red light, I heard the revving (sic) its engine to the point that the rev limiter was engaging on the engine to prevent the engine from blowing up.
>
> Q: Do you know what rev limiter is?
>
> A: It's like a protector—it is part of the engine that keeps it from blowing up. It's just a safety light on the engine.
>
> Q: Fair to say someone would have to pretty much floor the gas for that to engage?
>
> A: Yes.
>
> Q: How was that? Was that a continuous revving of the engine, or once and done?
>
> A: It was like a continuous revving.
>
> Q: This vehicle was stopped at the stop light; is that correct?
>
> A: Yes, it was.
>
> Q: Once the light turned green, what did the vehicle do.
>
> A: It dumped the clutch or released the clutch so that the engine was revved up which caused the tires to squeal excessively through the intersection.

N.T., 6/24/11, at 6-7.

The trial court opined:

> Patrolman Allen observed a black sedan traveling west on Lehman Street when he heard the driver of the vehicle rev the engine and vehicle's tires squealed in a excessive manner for several seconds. [Appellant] intentionally increased the speed of his engine to the point that the RPM limiter engaged on the engine. The fact that Patrolman Allen was situated across the street yet could still hear the engine rev to the point that the RPM limiter engaged

> indicates that [Appellant's] actions were loud, intentional and served no legitimate purpose.

Trial Ct. Op., 3/9/11, at 5. The trial court found "[g]iven the revvinig of the engine and the deliberate squealing of the tires, Patrolman Allen possessed probable cause to believe that [Appellant] violated the local ordinance." ***Id.*** at 6. We agree. Viewing the evidence supported by the record, there was probable cause to stop Appellant's vehicle for violation of Section 705.01(g). ***See Hilliar***, ***supra***.

Judgment of sentence vacated with respect to the conviction for DUI—highest rate of alcohol. Case remanded for resentencing. Jurisdiction relinquished.