NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DAVID WATTERSON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1950 WDA 2012

Appeal from the Judgment of Sentence October 18, 2012
In the Court of Common Pleas of Butler County
Criminal Division at No.: CP-10-CR-0001209-2011

BEFORE: SHOGAN, J., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. FILED: May 29, 2013

Appellant, David Watterson, appeals from the judgment of sentence entered October 18, 2012, following his conviction of driving under the influence of alcohol (DUI) and related charges.[1] We affirm.

On April 2, 2011, Trooper Mark Hoehn and Trooper James Long of the Pennsylvania State Police responded to a call reporting that there was a driver slumped over the wheel of his vehicle on Iman Road in Donegal Township, Butler County. There, at a stop sign, they found Appellant

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* Retired Senior Judge assigned to the Superior Court.

[1] Appellant purports to appeal from the November 28, 2012 order denying his post-sentence motions. We have changed the caption to reflect that his appeal properly lies from his judgment of sentence. ***See Commonwealth v. Dreves***, 839 A.2d 1122, 1122 n.1 (Pa. Super. 2003).

leaning forward in the driver's seat of a vehicle. His foot was on the brake, the engine was running, and the transmission was in drive. Trooper Hoehn opened the door, put the transmission in park, turned off the engine, and attempted to wake Appellant. The troopers detected a strong odor of alcohol and observed that, after waking, Appellant slurred his speech and had glassy eyes. Trooper Hoehn asked Appellant to perform field sobriety tests, which Appellant failed. The troopers took Appellant into custody and performed a breath test at Butler State Police barracks.[2]

The trial court held a non-jury trial on September 14, 2012, where Troopers Hoehn and Long testified. Appellant also submitted testimony from Margaret Raab, his niece; and Cathy Watterson, his sister and Ms. Raab's mother. They alleged that Ms. Raab had been driving Ms. Watterson's vehicle until it ran out of gas at the stop sign, then left Appellant sleeping in the vehicle, while she sought help. The court found this testimony incredible, and convicted Appellant of driving under the influence of alcohol—general impairment/incapable of safely driving, operating or being in actual physical control of the movement of the vehicle[3], and related summary violations[4]. With the aid of a presentence investigation report, on October

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[2] The test results were not admitted into evidence because they were incorrectly documented.

[3] 75 Pa.C.S.A. § 3802(a)(1).

[4] Stopping, standing and parking outside business and residence districts, 75 Pa.C.S.A. § 3351(a); careless driving, 75 Pa.C.S.A. § 3714(a); and restraint
(Footnote Continued Next Page)

18, 2012, the court sentenced Appellant to no less than thirty days nor more than sixty days' incarceration, followed by twenty-two months' probation, plus costs and fines. Appellant filed a post-sentence motion for judgment of acquittal and arrest of judgment on October 29, 2012, which the trial court denied on November 28, 2012.[5] Appellant timely appealed.[6]

Appellant raises two questions for our review:

> I. Whether sleeping in an abandoned, inoperable vehicle in the middle of the road, under the circumstances, is sufficient to prove Appellant drove, operated or was in control of the vehicle[?]
>
> II. Whether the verdict of guilty was against the weight of the evidence where the Commonwealth failed to present reliable testimony showing that the keys were in the vehicle[?]

(Appellant's Brief, at 4).

In his first issue, Appellant challenges the sufficiency of the evidence to sustain his conviction for DUI. (***Id.*** at 7). Specifically, he argues that "the Commonwealth failed to show Appellant drove the vehicle prior to it running out of gas [or] any additional evidence tending to show that Appellant was actually in control of the vehicle." (***Id.***). We disagree.

(Footnote Continued) ———————————

systems—driver of a passenger car, 75 Pa.C.S.A. § 4581(a)(2). (***See*** Non-Jury Verdict, 9/17/12, at 1-2; Amended Non-Jury Verdict, 9/18/12, at 1).

[5] Appellant's post-sentence motion raised the same issues of weight and sufficiency of the evidence that he challenges on appeal.

[6] Pursuant to the trial court's order, Appellant filed a Rule 1925(b) statement on December 28, 2012. The trial court filed its Rule 1925(a) opinion on the same day. ***See*** Pa.R.A.P. 1925.

Our standard of review is well-settled:

> When reviewing a challenge to the sufficiency of the evidence, we must determine if the Commonwealth established beyond a reasonable doubt each of the elements of the offense, considering the entire trial record and all of the evidence received, and drawing all reasonable inferences from the evidence in favor of the Commonwealth as the verdict-winner. The Commonwealth may sustain its burden of proof by wholly circumstantial evidence.

Commonwealth v. Segida, 985 A.2d 871, 880 (Pa. 2009) (citations omitted).

Section 3802 of the Vehicle Code provides, in relevant part:

> **§ 3802. 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.

75 Pa.C.S.A. § 3802(a)(1).

> The term "operate" requires evidence of actual physical control of either the machinery of the motor vehicle or the management of the vehicle's movement, but not evidence that the vehicle was in motion. Our precedent indicates that a combination of the following factors is required in determining whether a person had "actual physical control" of an automobile: the motor running, the location of the vehicle, and additional evidence showing that the defendant had driven the vehicle. A determination of actual physical control of a vehicle is based upon the totality of the circumstances. The Commonwealth can establish through wholly circumstantial evidence that a defendant was driving, operating or in actual physical control of a motor vehicle.

Commonwealth v. Toland, 995 A.2d 1242, 1246 (Pa. Super. 2010), *appeal denied*, 29 A.3d 797 (2011) (citations and some quotation marks omitted).

Here, Trooper Hoehn testified that he and Trooper Long found Appellant asleep in the driver's seat at a stop sign on Iman Road, with his foot on the brake, the engine running, and the transmission in drive. (***See*** N.T. Non-Jury Proceedings, 9/14/12, at 9-11).

Appellant argues that this case is analogous to ***Commonwealth v. Byers***, 650 A.2d 468 (Pa. Super. 1994), in which a panel of this Court found that the evidence was insufficient to support the trial court's determination that the appellant was in actual physical control of his vehicle. (***See*** Appellant's Brief, at 11-13); ***see also Byers***, ***supra*** at 471. There, the appellant was found "sleeping it off" in the driver's seat of a locked vehicle, still parked at a bar with the motor running and the headlights on. ***Byers***, ***supra*** at 468-69. Our Court, specifically noting that the "purpose of [drunk driving] laws is to keep intoxicated drivers off of the road," stated that "the suspect location of the vehicle, which supports an inference that it was driven, is a key factor in a finding of actual control." ***Id.*** at 471, 469 (citations omitted).

However, our Supreme Court later criticized the portion of ***Byers*** relying on whether the appellant posed a "general threat to public safety," stating that "[t]he legislature has reasonably determined that one driving a motor vehicle on the public streets and highways of the Commonwealth

while under the influence of alcohol or controlled substances constitutes a threat to public safety *per se*, even if there are no other members of the public immediately endangered." ***Commonwealth v. Wolen***, 685 A.2d 1384, 1386 n.4 (Pa. 1996); ***see also Toland***, ***supra*** at 1247 ("Although ***Wolen***, as a plurality decision, is not binding on this court, the soundness of the reasoning in ***Byers*** has been called into question.").

Moreover, Appellant's case is immediately distinguishable: in ***Byers***, there was no evidence that the appellant had done more than turn on the engine in the parking lot of the establishment where he had become intoxicated; here, Appellant was found on a public road with his engine running, his transmission in drive, and his foot on the brake. (***See*** N.T. Non-Jury Proceedings, 9/14/12, at 9-11); ***cf. Byers***, ***supra*** at 470-71. Therefore, the Commonwealth adduced sufficient circumstantial evidence that Appellant had been driving, operating, or was in actual physical control of his vehicle. ***See Toland***, ***supra*** at 1246-47. Accordingly, the trial court did not err in determining there was sufficient evidence to sustain Appellant's DUI conviction. ***See Segida***, ***supra*** at 880. Appellant's first issue is without merit.

In his second issue, Appellant asserts the verdict is against the weight of the evidence, in light of his witnesses' testimony that his niece drove and abandoned the vehicle when it ran out of gas. (Appellant's Brief, at 9). He argues that "the Commonwealth failed to present reliable testimony showing that the keys were in the vehicle." (***Id.*** at 14). We disagree.

Our standard of review of a challenge to the weight of the evidence is well-settled:

> 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.
>
> Since the trial judge is in the best position to view the evidence presented, an appellate court gives the trial judge the utmost consideration when reviewing the court's determination that the verdict is against the weight of the evidence. This Court has noted that a true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be believed. Accordingly, a weight of the evidence challenge contests the weight that is accorded the testimonial evidence.

Commonwealth v. Morgan, 913 A.2d 906, 909 (Pa. Super. 2006), *appeal denied*, 927 A.2d 623 (Pa. 2007) (citations and quotation marks omitted).

First, Appellant's allegation that the Commonwealth failed to present testimony that the ignition key was in the vehicle lacks merit because his challenge to the weight of the evidence "concedes that sufficient evidence exists to sustain the verdict." ***Id.***

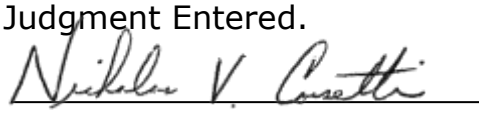
Second, the trial court found that Appellant was "slumped over in the driver's seat of a vehicle with his foot on the brake, the engine running, and

the transmission in drive," and that Appellant's claim that his niece, Ms. Raab, removed the ignition key and left Appellant sleeping in the passenger seat was "incredible." (Trial Court Opinion, 12/28/12, at 1). Therefore, our review is limited to whether the trial court "palpably abused its discretion in ruling on the weight claim." ***Morgan***, ***supra*** at 909.

We can discern no abuse of discretion by the trial court where its findings were supported by the testimony of Trooper Hoehn, and Appellant's claims were self-serving and contradictory. Specifically, Ms. Raab claimed that she left Appellant sleeping in the passenger seat, but the troopers found him in the driver's seat. (***Compare*** N.T. Non-Jury Proceedings, 9/14/12, at 9-11, ***with id.*** at 43). Furthermore, her mother, Ms. Watterson, alleged that there was only one ignition key which Ms. Raab kept, but Trooper Hoehn testified that he had to reach into the vehicle, put the transmission in park, and turn off the engine. (***See id.*** at 11, 50). Accordingly, the trial court did not abuse its discretion in finding that Ms. Raab and Ms. Watterson's testimony was not credible, and the record supports the trial court's determination that verdict was not against the weight of the evidence. ***See Morgan***, ***supra*** at 909. We find no basis on which to conclude that the denial of Appellant's post-sentence weight claim was so contrary to the evidence that it shocks the conscience of the Court. ***See id.*** Appellant's second issue is without merit.

Judgment of sentence affirmed.

Judgment Entered.



Deputy Prothonotary

Date: May 29, 2013