NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MATTHEW F. MOTTER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1517 MDA 2013

Appeal from the Judgment of Sentence July 11, 2013
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0001787-2012

BEFORE: PANELLA, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY PANELLA, J. **FILED MAY 19, 2014**

Appellant, Matthew Motter, appeals from the judgment of sentence entered July 11, 2013, in the Court of Common Pleas of Lancaster County. At issue is the trial court's decision to exclude evidence of a positive marijuana urinalysis taken from the victim of a car accident. After careful review, we affirm.

While driving a motor vehicle, Appellant struck a motorcycle driven by Shaun Roland. ***See*** Trial Court Opinion, 10/30/13, at 2. Roland received multiple injuries in the accident and was transported to Lancaster General Hospital Emergency Room. ***See id***. While receiving treatment for his

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* Retired Senior Judge assigned to the Superior Court.

injuries, a urinalysis was performed on Roland. ***See id***. As a result of the screen, he tested positive for marijuana. ***See id***.

Appellant was charged with accident involving death or personal injury, not property licensed;[1] accident involving death or personal injury;[2] and five summary violations of the Pennsylvania Motor Vehicle Code. ***See id***. at 1. Prior to trial, the Commonwealth filed a motion in limine to exclude the positive marijuana urinalysis. ***See id***. at 2. In support, the Commonwealth argued that the results do not indicate whether the substance is active marijuana or marijuana metabolites,[3] nor do the results indicate the quantity of the substance identified. ***See*** Commonwealth's Motion in Limine, 5/13/13, p. 1. Furthermore, the Commonwealth claimed the results were not probative on the issue of impairment since the results caution that it is an "unconfirmed screening result that MUST NOT be used for non-medical purposes (e.g. employment testing, legal testing)." ***Id***.

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[1] 75 PA.CONS.STAT.ANN. § 3742.1.

[2] 75 PA.CONS.STAT.ANN. 3742.

[3] "A 'metabolite' is the substance produced by metabolism or by a metabolic process." ***Vereen v. Commonwealth of Pennsylvania Bd. of Prob. & Parole***, 515 A.2d 637, 639 n.4 (Pa. Cmwlth. 1986) (*citing* DORTLAND'S ILLUSTRATED MEDICAL DICTIONARY 803 (26th Ed. 1981)). Thus, a marijuana metabolite is the substance produced as a result of the body metabolizing marijuana.

The trial court granted the motion, thus excluding any reference to Roland's positive urinalysis. Trial Court Opinion, 10/30/13, at 2.

Upon conclusion of a jury trial, Appellant was found guilty of the aforementioned offenses and received an aggregate sentence of 14 months' to 7 years' incarceration, followed by 7 years' probation, and various fines arising from the summary offenses. ***See id***. at 1. Appellant filed a timely notice of appeal and raises the following issue for our review:

> Did the trial court err in granting the Commonwealth's Motion in Limine, excluding evidence from Shaun Roland's positive urine test result for marijuana, where there was evidence, other than a positive test result, that Mr. Roland was under the influence of a controlled substance at the time of the accident?

Appellant's Brief at 5.

When reviewing the grant of a motion in limine, we apply an abuse of discretion standard of review. ***See Commonwealth v. Zugay***, 745 A.2d 639, 645 (Pa. Super 2000). "An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record." ***Commonwealth v. Antidormi***, 84 A.3d 736, 749 (Pa. Super. 2014) (citations omitted). "An abuse of discretion may result where the trial court improperly weighed the probative value of evidence admitted against its potential for prejudicing the defendant." ***Id***. at 750. (citations omitted).

The threshold question in determining the admissibility of evidence is whether the evidence is relevant. ***See*** Pa.R.E. 402. "Evidence is relevant if

it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact." ***Commonwealth v. Stokes***, 78 A.3d 644, 654 (Pa. Super. 2013) (citation omitted). Even relevant evidence may be inadmissible if its probative value is outweighed by its prejudicial impact. ***See*** Pa.R.E. 403.

The trial court excluded the positive urinalysis, reasoning that it did not tend to prove that Roland was under the influence of marijuana at the time of the accident. ***See*** Trial Court Opinion, 10/30/13, at 2. The trial court relied on ***Commonwealth v. Etchison***, 916 A.2d 1169 (Pa. Super. 2007), wherein our Court held that a positive blood test for marijuana metabolites, alone, was insufficient to establish impairment for the purposes of a general impairment DUI drug conviction pursuant to 75 PA.CONS.STAT.ANN. § 3802(d)(2).[4] ***See id***. at 1172. Our Court reasoned that

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[4] Subsection 3802(d) states:

> (d) An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
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> ***
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> (2) The individual is under the influence of a drug or combination of drugs to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle.

(Footnote Continued Next Page)

a positive blood screen for marijuana metabolites is not an indication of present impairment necessary to establish subsection 3802(d)(2) conviction. ***See id***. Instead, such a result merely suggests that the defendant ingested marijuana sometime previously. ***See id***.

Appellant argues that ***Etchison*** has since been distinguished by our Supreme Court in ***Commonwealth v. Griffith***, 32 A.3d 1231 (Pa. 2011). ***Griffith*** also involved a general impairment DUI drug conviction pursuant to Subsection 3802(d)(2).[5] In ***Griffith***, the defendant was suspected of driving under the influence of drugs. Defendant submitted to a blood test, which detected Diazepam, at 95 nanograms per milliliter, and Nordiazepam, a metabolite of Diazepam, at 220 nanograms per milliliter. Both Diazepam and Nordiazepam are Schedule IV controlled substances. Defendant argued that the blood test results were insufficient to establish her conviction since the Commonwealth failed to proffer expert testimony to establish that the prescription medications in her blood impaired her ability to drive safely.

(Footnote Continued) ———————————

75 Pa. Cons. Stat. Ann. § 3802(d)(2).

[5] We acknowledge that the instant case does not involve a general impairment DUI drug prosecution that was at issue in both ***Etchison*** and ***Griffith***. Nonetheless, we find the cases persuasive since they both involve an allegedly impaired motorist, as well as a positive drug test proffered to establish this alleged impairment.

Upon reviewing relevant case law, which included ***Etchison***, our Supreme Court declined to establish a blanket rule requiring expert testimony in all general impairment DUI drug prosecutions to establish that the amount of a controlled substance found in a defendant's blood or urine caused impaired driving. ***See Griffith***, 32 A.3d at 1239 ("[W]e decline to impose a requirement for expert testimony in all prosecutions under subsection 3802(d)(2)."). While not required in all prosecutions, the Court did concede that "in some cases, depending on the facts and circumstances, expert testimony may be helpful, or perhaps even necessary, to prove causation under subsection 3802(d)(2)…." ***Id***. at 1238. Thus, the question of whether expert testimony is necessary in such cases "must be evaluated on a case-by-case basis, taking into account not just the specific drug at issue … but also the nature and overall strength of the Commonwealth's evidence…." ***Id***. at 1239. In sum, the Court determined that expert is not necessary to establish impairment under subsection 3802(d)(2) where there exists other independent evidence of impairment.

While ***Griffith*** and the instant case do have some similarities — i.e. a motorist alleged to be under the influence of drugs and a positive drug test result proffered to establish that impairment — our case differs in two significant ways: the lack of independent evidence of impairment and the uncertainty surrounding the probative value of the positive urinalysis.

In ***Griffith***, independent evidence existed to establish impairment beyond the positive blood test. There, the responding officer witnessed the

defendant struggle to maintain her balance because she was constantly swaying and catching herself on her vehicle. ***Id***. at 1240. He also noticed she had difficulty lighting her cigarette because her hands were shaking. ***Id***. Furthermore, the officer observed defendant unsuccessfully perform three separate field sobriety tests. ***Id***. Defendant also admitted to taking another drug, Soma 350, on the morning of the accident. ***Id***. This admission was strengthened when officers found prescription pill bottles containing Soma in defendant's center console. ***Id***. at 1234. Thus, defendant's inability to drive safely was established not only by the positive drug test, but also by the officer's observations of defendant's suspicious behavior, the defendant's admission of taking prescription medication on the same day, and the defendant's possession of prescription medication within the vehicle. Such independent evidence of impairment is absent from our case.

Appellant suggests that Roland's trial testimony surrounding specific details of accident is at odds with the responding officer's same testimony. ***See*** Appellant's Brief at 13. Thus, Appellant claims Roland's alleged faulty recollection of the events independently establishes that he may have been under the influence of marijuana at the time of the accident. ***See id***. We find it unpersuasive that perceived inconsistencies in trial testimony are probative on the issue of marijuana impairment at the time of the accident. Such inconsistencies are just as easily contributed to other factors such as the two-year passage of time between the accident and trial, the rapid series of events that lead to the accident, ***see*** N.T., 5/13/13, at 54-55, or the fact

that Roland suffered serious injuries at the scene which could have diverted his attention from specific details. At best, these alleged inconsistencies could potentially act as corroborative evidence to support independent evidence of impairment; however, we are not persuaded that these alleged inconsistencies, on their own, constitute such independent evidence.

Even assuming inconsistent trial testimony is probative on the issue of impairment, the record is devoid of such evidence. Appellant claims that Roland indicated he was hit head-on, while the officer concluded the evidence suggested the accident was a sideswipe. However, when detailing the specifics of the accident, Roland indicated that he was hit by the front driver's side of the car. ***See*** N.T., 5/13/13, at 52. The officer confirmed there was damage to the front driver's side of the car that continued down the driver's side of the car. ***See*** N.T., 5/13/13, at 102. We see no inconsistency in these statements.[6]

In addition to the lack of independent evidence of impairment, there also exists substantial doubt surrounding the reliability of the urinalysis. In ***Griffith***, there was no question regarding the accuracy of the blood test performed. However, in our case, explicit language from the urinalysis results seriously casts doubt on the test's ability to establish impairment at

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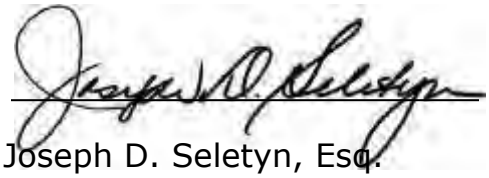
[6] Appellant also claims Roland provided inconsistent testimony regarding the location of Appellant's vehicle at the time the accident occurred. We find the record fails to support this assertion.

the time of the accident. Specifically, the results caution against their use for any non-medical purpose. Surely, utilizing the results as evidence of Roland's impairment is a non-medical purpose. Furthermore, the results fail to specify whether the substance is active marijuana or marijuana metabolites. It also fails to indicate the quantity of the substance identified. It would be illogical to allow Appellant to use the test results for establishing marijuana impairment in the face of these shortcomings.

In sum, we find the trial court did not abuse its discretion in granting the Commonwealth's motion in limine. Our decision is based on the lack of independent evidence to establish impairment at the time of the accident, as well as the aforementioned doubts surrounding the probative value of the urinalysis.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/19/2014