NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellant v. MATTHEW NICHOLAS GUERRIERI, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1783 MDA 2013

Appeal from the Order Entered September 3, 2013,
in the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0000518-2013

BEFORE: DONOHUE, WECHT, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED JUNE 24, 2014**

The Commonwealth appeals from an order granting the petition for writ of *habeas corpus* filed by Matthew Nicholas Guerrieri (Appellee). We reverse the order and remand for further proceedings.

Police arrested Appellee and charged him with violating several statutes, including 75 Pa.C.S. § 3802(d)(1)(i) and (iii). Subsection 3802(d) provides as follows.

> **(d) Controlled substances.--**An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
>
> (1) There is in the individual's blood any amount of a:
>
> (i) Schedule I controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), [] known as The Controlled Substance, Drug, Device and Cosmetic Act;

* Retired Senior Judge assigned to the Superior Court.

> (ii) Schedule II or Schedule III controlled substance, as defined in The Controlled Substance, Drug, Device and Cosmetic Act, which has not been medically prescribed for the individual; or
>
> (iii) metabolite of a substance under subparagraph (i) or (ii).

75 Pa.C.S. § 3802.

According to the trial court's docket, on July 1, 2014, Appellee filed an omnibus pre-trial motion. That motion is not in the certified record. However, on July 3, 2013, the trial court held a brief hearing on the motion. At the hearing, defense counsel indicated that he "filed a habeas." N.T., 7/3/2013, at 2. The parties stated that they stipulated to the facts outlined in the affidavit of probable cause attached to the criminal complaint and asked the trial court to decide the *habeas* petition on those facts.

The trial court summarized the facts as follows.

> On October 26th 2012, at approximately 11:50 p.m., Wildlife Conservation Officer Teehan was conducting a saturation patrol. Officer Teehan and other [o]fficers observed [Appellee] 'spot-lighting' deer from his vehicle. Officer Teehan started to follow [Appellee]. At this time, [Appellee] was traveling at a high rate of speed on Oysterdale Road. Officer Teehan initiated a vehicle stop of [Appellee]. During the stop Officer Teehan smelled the odor of an alcoholic beverage along with the scent of burnt [m]arijuana from inside the vehicle.
>
> Since Officer Teehan observed a Game Law violation, he had both occupants removed from the vehicle and inquired if a firearm was inside of the vehicle. [Appellee] produced a Sig Sauer 380 handgun as well [as] a permit to carry. While Officer Teehan [was] conversing with [Appellee], he [admitted] to smoking marijuana approximately 45 minutes prior to being stopped. He also mentioned that he was drinking throughout the day and his last beer was approximately 45 minutes prior

> [to] being stopped. Upon securing both occupants, a search warrant was conducted and revealed a green leafy substance in the center of the console. [Appellee] was then placed under arrest.

Trial Court Opinion, 12/13/2013, at 2.

The affidavit of probable cause attached to the criminal complaint also states as follows.

> A summary Toxicology Report received from St. Joseph's Quality Medical Labs revealed the following:
>
> Delta-9 THC – 7 ng/mL
>
> Delta-9 Carboxy THC – 53 ng/mL
>
> 11-Hydroxy Delta-9 THC – 5.8 ng/mL

Affidavit of Probable Cause, dated 12/12/2013.

On July 24, 2013, the trial court issued an order denying Appellee's petition for writ of *habeas corpus*. On August 22, 2013, Appellee filed a motion for reconsideration of the *habeas* ruling. In that motion, Appellee stated that state police had charged him with driving under the influence (DUI) of marijuana. He presented the following claims with regard to that charge:

> 4. There was no Probable Cause to charge [Appellee] with D.U.I. in that **no impaired driving was observed nor alleged**.
>
> 5. To interpret the D.U.I.-marijuana statute as a strict liability statute, without the need to observe impaired driving, would be unconstitutionally overbroad as it would far exceed the government interest in keeping roads safe.

Motion for Reconsideration of Habeas Ruling, 8/22/2013, at 1 (emphasis in original).

In response to this motion, the trial court entered an order dismissing Appellee's counts for DUI. The Commonwealth timely filed a notice of appeal wherein it certified that the court's ruling terminated or substantially handicapped the prosecution of this case. The trial court directed the Commonwealth to comply with Pa.R.A.P. 1925(b). The Commonwealth timely filed a concise statement of errors complained of on appeal, wherein it presented one issue, namely, "The trial court erred in dismissing marijuana-related DUI charges filed pursuant to 75 Pa.C.S.A. §§3802(d)(1)(i) and (iii) based upon a claim that these charges are unconstitutionally overbroad strict liability offenses because they do not require a showing of the operator's incapability of safe driving." Concise Statement of Errors Complained of on Appeal, 10/15/2013.

The trial court issued an opinion in response to the Commonwealth's concise statement, wherein it provided the following discussion.

> The issue on appeal is whether the trial court erred in dismissing marijuana-related DUI charges filed pursuant to 75 Pa.C.S.A. §3802(d)(1)(i) and (iii) based upon [a] claim that these charges are unconstitutionally overbroad strict liability offenses because they do not require a showing of the operator's incapability of safe driving, respectively. In particular, the Commonwealth argues that [Appellee] was rendered incapable of safely driving.
>
> In this case Officer Teehan observed a vehicle committing a Gamming (*sic*) Violation (Spotlighting). To furthering his investigation (*sic*), Officer Teehan initiated a traffic stop. Upon

> his encounter with [Appellee] and "other occupants" in the vehicle, he detected a moderate odor of alcohol/marijuana coming from the vehicle but **did not** differentiate where the odor was coming from. At this time [Appellee] admitted that he had a beer earlier in the day. Officer [Teehan] did not observe [Appellee's] eyes to be bloodshot or glassy, nor did he hear [Appellee] slur his words. Furthermore, Officer Teehan did not administer the Walk and Turn, One Leg Stand or a PBT test to [Appellee]. It was Officer Teehan's opinion that [Appellee] was under the influence to a degree that rendered him incapable of safe driving. Based on this information, Officer Teehan placed [Appellee] under arrest for suspicion of DUI.
>
> Based on the totality of the circumstances, the [c]ourt finds that the Commonwealth has not established that at the time of the arrest, the officer had probable cause to charge [Appellee] for suspicion of DUI of a Controlled Substance. The Officer did not observe any Motor Vehicle violations of [Appellee] or conduct any SFST's to determine if the operator ([Appellee]) was incapable of safe driving. Thus, the [c]ourt finds that the charge on the part of law enforcement was not warranted and was in violation of [Appellee's] constitutional rights. Based on all of the foregoing, this [c]ourt respectfully requests that the Commonwealth's appeal be DENIED.

Trial Court Opinion, 12/13/2013, at 2-3 (emphasis in original).

In its brief to this Court, the Commonwealth raises the same issue that it raised in its concise statement of errors complained of on appeal. In support of its issue, the Commonwealth argues that subsection 3802(d)(1) does not require proof that Appellee was impaired while driving his vehicle. According to the Commonwealth, "[i]n order to sustain a conviction, the evidence must demonstrate that any amount of the identified controlled substance was in the driver's blood at the time he or she was driving." Commonwealth's Brief at 9. The Commonwealth maintains that, because the evidence indicates that Appellee was driving his vehicle with marijuana

and/or its metabolites in his blood, it met its burden of establishing a *prima facie* case that Appellee violated subsections 3802(d)(1)(i) and (iii). The Commonwealth also argues that this Court has rejected a claim that subsection 3802(d)(1) is unconstitutionally overbroad.

In considering the Commonwealth's arguments, we are mindful of the following principles.

> When reviewing a trial court's decision to grant a *habeas corpus* petition, we will not reverse the trial court's decision absent a manifest abuse of discretion. In order to constitute an abuse of discretion, the record must disclose that the trial court exercised manifestly unreasonable judgment or based its decision on ill will, bias or prejudice. Furthermore, our scope of review is limited to determining whether the Commonwealth has established a *prima facie* case. In criminal matters, a *prima facie* case is that measure of evidence which, if accepted as true, would justify the conclusion that the defendant committed the offense charged….

Commonwealth v. Ruby, 838 A.2d 786, 788 (Pa. Super. 2003) (citations and quotation marks omitted).

First, in ***Commonwealth v. Etchison***, 916 A.2d 1169, 1172-73 (Pa. Super. 2007), Etchison argued, *inter alia*, that subsection 3802(d)(1) is unconstitutionally overbroad because it does not require a finding of present impairment. This Court rejected that argument. The Court went on to state that "a conviction under [s]ection 3802(d)(1) does not require that a driver be impaired; rather, it prohibits the operation of a motor vehicle by *any* driver who has *any* amount of specifically enumerated controlled substances in his blood, regardless of impairment." ***Commonwealth v. Etchison***, 916

A.2d 1169, 1174 (Pa. Super. 2007) (emphasis in original). Thus, in order for the Commonwealth to establish a *prima facie* case that Appellee violated subsections 3802(d)(1)(i) and (iii), it had to present evidence, when accepted as true, which demonstrates that Appellee drove a vehicle when his blood had any amount of marijuana and a metabolite of marijuana.[1] 75 Pa.C.S. §§ 3802(d)(1)(i) and (iii).

The facts, as stipulated to by the parties, establish that Officer Teehan smelled the odor of burnt marijuana coming from the vehicle Appellee was driving. Moreover, Appellee admitted to Officer Teehan that he smoked marijuana approximately 45 minutes prior to the officer pulling over Appellee's vehicle. A search of the vehicle uncovered marijuana in the center console of the vehicle. Lastly, Appellee's toxicology report revealed the presence of various forms of "THC." "'T.H.C.' is the abbreviation for Tetrahydrocannbinol, the active ingredient in hashish and marijuana." ***Commonwealth v. Glass***, 754 A.2d 655, 659 n.5. (Pa. 2000).

We hold that these stipulated-facts are sufficient to demonstrate a *prima facie* case that Appellee violated subsections 3802(d)(1)(i) and (iii). Consequently, the trial court manifestly abused its discretion by granting Appellee's petition for writ of *habeas corpus*. We, therefore, reverse the trial court's order and remand for further proceedings.

Order reversed. Case remanded. Jurisdiction relinquished.

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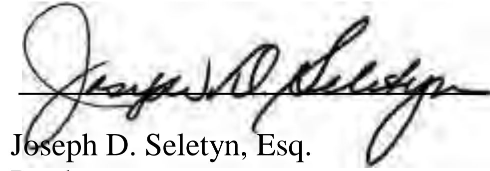
[1] Marijuana is a Schedule I controlled substance. 35 P.S. § 780-104(1)(iv).

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/24/2014