NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOSEPH THOMAS,	:	
	:	
Appellant	:	No. 1929 EDA 2013

Appeal from the Judgment of Sentence Entered June 14, 2013,
In the Court of Common Pleas of Philadelphia County,
Criminal Division, at No. CP-51-CR-0007357-2012.

BEFORE: FORD ELLIOTT, P.J.E., BOWES and SHOGAN, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED JULY 10, 2014**

Appellant, Joseph Thomas, appeals from the judgment of sentence entered June 14, 2013, following his conviction by a jury of driving under the influence ("DUI"), 75 Pa.C.S.A. § 3802(a)(1). We affirm.

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

> At the trial for Appellant, the complainant, Raul Castillo, testified that at approximately 11 p.m. on September 22, 2011, he was operating a 2012 Ford Fusion on Interstate 95 heading southbound. There were streetlights and Interstate 95 was well-lit. There was medium traffic and the street was not wet. Mr. Castillo testified that he observed in his rear mirror a black Dodge Durango driving very fast. Mr. Castillo was driving originally in what was the second [lane] to the right and then he pulled over into the right lane to let the car pass. The Dodge Durango had gone into that lane as well and clipped him on his rear left.
>
> Both vehicles pulled over to the shoulder and the drivers exited their vehicles. Mr. Castillo testified that Appellant was the person who was driving the vehicle that had collided with his

vehicle and that he had not seen anyone else in that vehicle. Mr. Castillo stated that after exchanging information, Appellant didn't want to speak to the police and that Appellant was trying to leave the scene. Appellant told Mr. Castillo that he had to go to work early and kept coming up with excuses to leave. Mr. Castillo testified that he didn't get that close to Appellant and didn't smell any alcohol on Appellant, but that as Appellant got back into his vehicle, Mr. Castillo noticed that Appellant stumbled a little bit.

Pennsylvania State Police Trooper Adam Kirk testified at trial that he was notified over dispatch of a two car non-reportable crash and he arrived with his partner at the accident scene. Trooper Kirk testified that he didn't detect anything out of the ordinary about Mr. Castillo, no odor of alcohol, no bloodshot eyes, etc., and that Mr. Castillo was calm and had a normal demeanor when telling Trooper Kirk what happened at the accident scene. In contrast, Trooper Kirk testified that he noticed that Appellant had glassy, bloodshot eyes, smelled of alcohol, and had slurred speech. Trooper Kirk testified that Appellant was slow and sluggish, and had swaying, unsure footing, was indifferent, and insulting. Appellant told Trooper Kirk that he had had two beers. Trooper Kirk testified that the statement Appellant gave about the accident didn't make a lot of sense to him because the damage matched with the story Mr. Castillo told Trooper Kirk, but not the story Appellant told him.

Trooper Kirk testified that Appellant didn't complete the field sobriety test[1] to satisfaction. On a walk and turn test, Appellant turned improperly on the second nine.[2] He missed the heel to toe steps on the first nine and the second nine. On a one-leg stand sobriety test, Appellant raised his right foot, swayed, and put his foot down. Trooper Kirk, based on the performance in the sobriety tests and his experience, determined that Appellant was incapable of safe driving and placed him under arrest.

---

[1] A field sobriety test consists of three different tests. "There's one that refers to the eyes and there's a walk and turn and one leg stand." N.T., 5/13/13, at 63–64.

[2] "The walk and turn is a coordination exercise of taking a series of nine [heel] toe steps down." N.T., 5/13/13, at 64.

> Trooper Kirk testified that after he placed Appellant under arrest, Appellant became combative and began making insults. Appellant was angry and complained that Trooper Kirk didn't give a field sobriety to Mr. Castillo. Appellant yelled and screamed racial slurs to Trooper Kirk and his partner, calling Trooper Kirk a cracker and a "honky" repeatedly. Trooper Kirk and his partner took Appellant to the Police Detention Unit for a chemical test of breath. Trooper Kirk asked Appellant to submit to a chemical test of breath several times, and read the chemical testing warnings out loud. While Trooper Kirk was reading the chemical test warnings, Appellant was yelling and screaming that Trooper Kirk was a racist. At that point, Trooper Kirk turned away and walked off stating that when someone does not make a statement of giving consent or asks to speak with an attorney it is deemed a refusal of the chemical testing.

Trial Court Opinion, 12/4/13, at 2–4 (internal citations to the record omitted).

Appellant was charged with criminal mischief, DUI, and recklessly endangering another person. Initially, in the Philadelphia Municipal Court, Appellant was convicted of criminal mischief and DUI and sentenced on June 19, 2012. Appellant thereafter filed an appeal for a trial *de novo* in Philadelphia Common Pleas Court. On May 13, 2013, a jury convicted Appellant of DUI and found him not guilty of criminal mischief. N.T., 5/13/13, at 138–139. The trial court sentenced Appellant on June 14, 2013, to seventy-two hours to six months of imprisonment, plus a concurrent term of six months of probation. N.T., 6/14/13, at 8. The sentencing court also ordered a twelve-month suspension of Appellant's license, ordered Appellant to pay a five hundred dollar fine, and required his attendance at alcohol highway safety school. ***Id***.

Appellant filed a timely appeal on June 28, 2013. Both the trial court and Appellant complied with Pa.R.A.P. 1925. Appellant raises the following single issue on appeal:

> Was not the evidence insufficient as a matter of law to sustain [A]ppellant's conviction for 75 Pa.C.S. § 3802(a)(1) where the Commonwealth failed to prove that [A]ppellant imbibed a sufficient amount of alcohol such that he was rendered incapable of safely driving within the meaning of the Vehicle Code?

Appellant's Brief at 3.

In reviewing the sufficiency of the evidence, we must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to prove every element of the offense beyond a reasonable doubt. ***Commonwealth v. Rivera***, 983 A.2d 1211 (Pa. 2009); ***Commonwealth v. James***, 46 A.3d 776 (Pa. Super. 2012). It is within the province of the fact-finder to determine the weight to be accorded to each witness's testimony and to believe all, part, or none of the evidence. ***Commonwealth v. Cousar***, 928 A.2d 1025 (Pa. 2007); ***Commonwealth v. Moreno***, 14 A.3d 133 (Pa. Super. 2011). The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. ***Commonwealth v. Hansley***, 24 A.3d 410 (Pa. Super. 2011). Moreover, as an appellate court, we may not re-weigh the evidence and substitute our judgment for that of the fact-finder. ***Commonwealth v. Ratsamy***, 934

A.2d 1233 (Pa. 2007); ***Commonwealth v. Brown***, 23 A.3d 544 (Pa. Super. 2011). Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so inconclusive that as a matter of law no probability of fact may be drawn from the circumstances. ***Moreno***, 14 A.3d at 133.

The relevant statute provides as follows:

> **§ 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). "In order to be found guilty of DUI—general impairment, an individual's alcohol consumption must substantially impair his or her ability to safely operate a vehicle." ***Commonwealth v. Mobey***, 14 A.3d 887, 890 (Pa. Super. 2011).

> 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.

Commonwealth v. Segida, 985 A.2d 871, 879 (Pa. 2009). General impairment does not require evidence of blood alcohol content to sustain a

conviction. ***Commonwealth v. Brugger***, 88 A.3d 1026, 1028 n.2 (Pa. Super. 2014).

Appellant argues that evidence presented at trial was insufficient to prove that he was incapable of safely driving due to having imbibed alcohol. Appellant's Brief at 9. Appellant maintains that by pulling over to safety after the accident, exchanging relevant information with Mr. Castillo, taking pictures of the damage, and remaining on the scene even though he was not required to do so, he demonstrated that he was capable of safe driving. ***Id***.

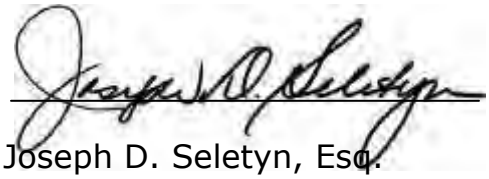
The Commonwealth presented the testimony of Mr. Castillo and Trooper Kirk regarding Appellant's behavior on September 22, 2011, which supported the Commonwealth's claim that Appellant's alcohol consumption substantially impaired his ability to safely operate a vehicle that evening. Mr. Castillo testified that Appellant was trying to leave the scene and stumbled when he got into his vehicle. N.T., 5/13/13, at 39. Trooper Kirk observed that Appellant smelled of alcohol, had bloodshot eyes, and slurred his speech. ***Id***. at 59–61. At that point, Trooper Kirk administered a field sobriety test, which Appellant failed to complete properly. ***Id***. at 66. After Trooper Kirk arrested Appellant, Appellant became irate, insulting, and combative. ***Id***. at 72. At the Police Detention Unit, Appellant threatened to kill Trooper Kirk. ***Id***. at 73. Trooper Kirk asked Appellant two or three times

to submit to a chemical test, but Appellant refused by continuing to scream and yell racial slurs. ***Id***. at 75–76.

The jury was free to accord weight to each of the witness's testimony and to believe all, part, or none of the evidence presented. ***Moreno***, 14 A.3d at 133. The Commonwealth offered evidence of Appellant's physical signs of intoxication, demeanor, and inability to pass the field sobriety test, which was sufficient to prove beyond a reasonable doubt that Appellant "imbibed a sufficient amount of alcohol that rendered Appellant incapable of safely driving" on the evening of September 22, 2011. 75 Pa.C.S.A. § 3802(a)(1). Given the totality of the circumstances, the evidence presented supported the jury's determination that Appellant was driving under the influence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/10/2014