NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. MITCHELL N. FILI, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 804 MDA 2013

Appeal from the Judgment of Sentence April 11, 2013
In the Court of Common Pleas of Bradford County
Criminal Division at No(s): CP-08-CR-0000846-2012

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

MEMORANDUM BY BOWES, J.: **FILED APRIL 15, 2014**

Mitchell N. Fili appeals from the April 11, 2013 judgment of sentence of thirty days to six months incarceration, together with a mandatory fine of $750, imposed after he was convicted at a non-jury trial of driving while under the influence ("DUI"), general impairment with a BAC of at least .08% but less than .10%, and DUI, high rate of alcohol. After careful review, we reverse the judgment of sentence and order Appellant discharged.

On July 30, 2012, at approximately 9:00 a.m., Appellant was driving a one-half-ton Ford 150 pick-up truck and towing a dual axle trailer on Route 6 in Bradford County. Pennsylvania State Police Motor Carrier Enforcement Officer Derek Kelly was conducting systematic inspections of commercial

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* Former Justice specially assigned to the Superior Court.

vehicles at the intersection of Routes 6 and 220. He stopped Appellant's vehicle for a routine inspection. After some interaction with Appellant, Officer Kelly observed that Appellant's eyes were bloodshot, his speech was slurred, and he detected an odor of alcohol. Officer Kelly summoned Pennsylvania State Police Trooper Timothy Young, who was present to provide security for the enforcement personnel. Trooper Young initiated a DUI investigation. After conducting two field sobriety tests, the trooper placed Appellant under arrest. Appellant was transported to the Towanda Memorial Hospital ("the Hospital") where his blood was drawn for purposes of obtaining blood alcohol test results.

At trial, the parties stipulated to a number of facts. The Hospital was an approved facility for the testing of serum and blood for alcohol content. Stipulated Facts, No. 1. The lab technician was qualified and licensed to test blood, and Appellant knowingly and voluntarily consented to a blood test. Stipulated Facts, Nos. 2, 3. The blood sample was prepared for testing in the following manner:

> a. A 1:3 dilution of whole blood to trichloroacetic acid is prepared by adding 500 mL of patient whole blood and 1000 mL TCA to the tube which is mixed and vortexed.
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> b. The sample is then centrifuged in the Abbott Ultrafuge for 10 minutes at 10000 RPM.
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> c. The resulting supernatant liquid is what is tested.
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> d. The solid precipitate is discarded and not tested.

Stipulated Facts, No. 5.

The Abbott Architect analyzer used to test Appellant's blood was approved for this purpose by the Department of Health and properly calibrated and working that day. Stipulated Facts, Nos. 6, 7, and 9. An enzymatic test was conducted and subjected to spectrophotometric analysis, an approved method of testing under Pennsylvania law. Stipulated Facts, Nos. 7, 8, 10. The test result obtained on the supernatant liquid was .126 g/dL, and no conversion factor was applied to this result. Stipulated Facts, Nos. 11, 12. The Commonwealth did not offer any testimony at trial of a scientifically acceptable conversion rate.

The trial court convicted Appellant of DUI, BAC of at least .08% but less than .10%, 75 Pa.C.S. § 3802(a)(2),[1] and DUI (high rate of alcohol), 75 Pa.C.S. § 3802(b). Appellant was acquitted of DUI (commercial or school vehicle) under subsection (f), and DUI (incapable of safe driving) under (a)(1). As to the latter, the court found no evidence that Appellant's driving was "anything unusual" prior to the routine stop, and he exited his vehicle with no observed impairment. N.T., 2/27/13, at 90.

Appellant timely filed the within appeal and complied with the trial court's order to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. He presents two issues for our review:

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[1] The DUI conviction based on a BAC of at least .08% but less than .10%, merged with the conviction of DUI, high rate of alcohol.

1. The Trial Court made an error of law when it determined that the necessity of applying a scientifically acceptable conversion factor to determine a whole blood equivalent test result to a less than whole blood test did not apply to 75 Pa.C.S.A. 3802(a)(2) or (b).

2. There was insufficient evidence to convict Defendant of having either a BAC of .08 to .99 or .1 to .159 as the Commonwealth failed to present a scientifically acceptable conversion factor or range of conversion factors to the less than whole blood test results and present a whole blood alcohol equivalent test result.

Appellant's brief at 1.

Initially, we note that the legal error identified in Appellant's first issue supplies the foundation for Appellant's challenge to the sufficiency of the evidence. Since the issues rise and fall together, and Appellant argues them together, we will treat them as a challenge to the sufficiency of the evidence. In reviewing such a challenge, the standard we apply 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 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).

Appellant alleges that the trial court's error in admitting a BAC based on supernatant testing without evidence of a conversion factor renders infirm both of his DUI convictions. The conviction of DUI (high rate of alcohol) required proof that (1) the defendant was driving, operating, or in actual factual physical control of the movement of a vehicle, and (2) the defendant's blood alcohol content was at least 0.10% but less than 0.16% within two hours of driving, operating, or being in control of the vehicle. 75 Pa.C.S. § 3802(b). His conviction of DUI, general impairment, required the same proof of vehicle operation and a blood alcohol concentration of at least .08% but less than .10% within two hours of driving or operating a motor vehicle. 75 Pa.C.S. § 3802(a)(2).

Appellant contends that the Commonwealth introduced results of testing on supernatant rather than whole blood and maintains that such evidence is legally insufficient unless the Commonwealth introduces evidence of a generally accepted conversion factor. Appellant cites a series of decisions from this Court interpreting former § 3731(a) and 75 Pa.C.S. § 3802, for the proposition that tests of blood serum, blood plasma, and supernatant are not tests of whole blood under the Vehicle Code, and that evidence of a conversion factor is necessary. ***See e.g. Commonwealth v. Renninger***, 682 A.2d 356 (Pa.Super. 1996); ***Karns***, ***supra***; ***Commonwealth v. Haight***, 50 A.3d 137 (Pa.Super. 2012).

The Commonwealth counters that the factual stipulations of the parties, together with the opinion in ***Commonwealth v. Miller***, CP-08-CR-618-2011 (Bradford Co. 2013), are sufficient to sustain its burden of proof. In ***Miller***, the court held that the testing method used on supernatant was a whole blood test and required no conversion factor. The Commonwealth argues further that our decisions in ***Renninger*** and ***Karns*** are "example[s] of the proliferation of poorly presented expert testimony which was fact specific and should not be . . . binding precedent where contrary testimony is presented and found to be credible." Commonwealth's brief at 3. Moreover, the Commonwealth adopts ***Miller's*** view of this Court's decisions as non-binding since we did not explicitly consider the effect of the 2004 changes in the DUI statute. ***Miller***, at 7.

The trial court declined to follow binding precedent of this Court and followed ***Miller*** as "the law on this issue in Bradford County." Trial Court Opinion, 8/19/13, at 2. In lieu of evidence of a conversion factor, the trial court herein adopted the conclusion in ***Miller*** that such evidence was unnecessary. It also relied upon what it characterized as a defense "stipulation" to Commonwealth Exhibit 1, the Hospital document containing the blood test results under the heading "Whole Blood Concentration", as satisfactory proof that it constituted a whole blood result.

Appellant responds that when he agreed to the Commonwealth's admission of blood alcohol testing results in a sealed envelope, he was not

stipulating to the truth of its contents. N.T., 2/27/13, at 52. Nor did Appellant stipulate that the ***Miller*** decision controlled; he merely acknowledged that it addressed the same issue. Appellant consistently maintained that this Court's decisions in ***Renninger***, ***Haight***, and ***Karns*** govern and require testimony of a generally accepted conversion factor before supernatant test results can be used to support a DUI conviction.

We agree with Appellant that the trial court overstated the import of the stipulated facts. The fact that Appellant acquiesced in the admission of the test document bearing the notation "Whole Blood Concentration" is not a stipulation to the truth of that representation as the Commonwealth maintains herein. On the contrary, the parties stipulated that the testing was conducted on supernatant. Furthermore, the instant record does not contain any testimony equivalent to that provided by the lab technician in ***Miller***, and the evidence in that case cannot be imported to fill the evidentiary void in the instant case. As Appellant correctly points out, he did not stipulate to the scientific evidence adduced or the conclusions reached in ***Miller***. Moreover, the court in ***Miller*** expressly limited his holding to the facts of that case. In short, herein, the Commonwealth did not introduce any evidence of a conversion factor, nor was there any stipulation that the result of testing on the supernatant was the equivalent of whole blood testing.

The Commonwealth, too, is guilty of overreaching. For instance, the Commonwealth argues that the fact that Towanda Memorial Hospital has not had an unsuccessful whole blood alcohol proficiency test in over four years constituted a finding that a test on supernatant is the equivalent of a whole blood test. We find this argument to be a *non-sequitur*. Since the Hospital was approved for the testing of serum **and** blood for alcohol content, the more reasonable conclusion to be drawn from the stipulated fact is that the Hospital's whole blood tests are accurate. Without more, the stipulation certainly does not establish that the Hospital's supernatant testing was whole blood testing as the Commonwealth posited.

The general rule for alcohol-related convictions for DUI is that only tests performed on whole blood will sustain a conviction. ***Haight***, ***supra***; ***Karns***, ***supra***. This Court has held that when blood alcohol testing is performed on only a portion of whole blood, such as plasma, serum, or supernatant, the result must be converted to reflect the alcohol content of the whole blood sample. ***Id***.; ***see also Commonwealth v. Brugger***, 2014 PA Super 56 (Pa.Super. 2014). In ***Haight***, expert testimony as to the ratio of ethanol concentration in supernatants as compared to whole blood was introduced by both the Commonwealth and the defendant. The court credited the testimony of the defense expert and ultimately convicted the defendant of a lesser BAC offense. In ***Karns***, ***supra***, the lab technician testified that the machine used a conversion factor, but she could not

identify the source of the factor. The calculations she performed on the raw test results did not convert the results of supernatant testing to whole blood. This Court found the evidence insufficient to sustain the DUI conviction because the Commonwealth failed to identify what conversion factor was used and that it was generally accepted in the scientific community.

In the instant case, the Commonwealth did not introduce any expert or scientific testimony regarding the conversion factor applicable to supernatant test results to arrive at a whole blood result. Instead, the trial court and the Commonwealth relied solely upon the factual stipulations and the reasoning of ***Miller***, and adopted it wholesale herein. That court determined that our recent decisions in ***Haight*** and ***Karns***, following ***Renninger***, were not binding as they were based on what it called the "unexamined premise" that the legislature did not change the law when it repealed 75 Pa.C.S. § 3731[2]

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[2] Former 75 Pa.C.S. § 3731(a.1) provided, in pertinent part, as follows:

> (a.1) Prima facie evidence.—
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> (1) It is prima facie evidence that:
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> (i) an adult had 0.10% or more by weight of alcohol in his or her blood at the time of driving, operating or being in actual physical control of the movement of any vehicle if **the amount of alcohol by weight in the blood** of the person is equal to or greater than 0.10% at the time a chemical test is performed on a sample of the person's breath, blood or urine;

and enacted 75 Pa.C.S. § 3802[3] in 2004. ***Miller*** at 5. Hence, the ***Miller*** court characterized it as a question of first impression as to whether the legislature's use of the word "concentration" rather than the "by weight of alcohol" language in the prior statute affected the viability of ***Renninger***. ***Miller*** at 6. The court construed the change in wording as indicative of legislative intent to depart from weight to volume measures of blood alcohol as the sole measure. From there, the court rationalized that, since the new statute was silent on the standard of measure, "it may be that legislature

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[3] 75 Pa.C.S. § 3802, Driving under influence of alcohol or controlled substance, provides in pertinent part:

> (a) General impairment.
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> . . . .
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> (2) 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 0.08% but less than 0.10%** within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.
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> (b) High rate of alcohol. --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.
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> . . . .

(emphasis added).

intended that blood alcohol concentration could be proved by any of three percentages" derived from volume, mass (weight) or mass of alcohol as a percentage of volume. ***Id***. at 6-7. The court then dismissed ***Renninger*** and its progeny as not controlling as they were based on the observation that "plasma, serum, and supernatant have densities which are different from whole blood," ***id***. at 8, and concluded that no conversion factor was necessary because it could not be said "that a test for the presence of alcohol in the supernatant yields a result different than a test of the whole blood." ***Id***. at 10.

We find the statutory interpretation of § 3802 in ***Miller*** contrived, unpersuasive, and illogical. Prior to that statute, the term "concentration" was frequently used when referring to the content of alcohol in the breath or blood. ***See e.g.*** 67 Pa.Code § 77.22 (defining "alcohol breath test" as chemical testing of a sample "in order to determine the concentration of alcohol in the person's blood," and "chemical testing" as "analysis performed on a biological material . . . to determine the identity, concentration, or both, of particular constituents such as alcohol or controlled substances."). ***Miller*** ignores the critical fact that, in crafting § 3802, the legislature did not change the long-standing requirement that BAC levels are to be based upon the testing of whole blood. ***See Commonwealth v. Michuck***, 686 A.2d 403, 406 (Pa.Super. 1996) ("The statutory alcohol content limit . . . refers to

the alcohol content of whole blood, not blood serum."). Nor did the legislature change the BAC percentages for DUI convictions.

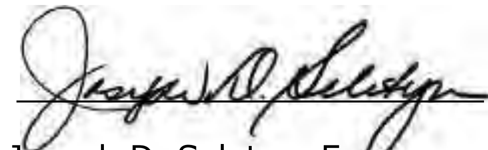
We also find no support for the court's characterization of the testing of supernatant as a whole blood test. In the instant case, testing was performed on a portion of the whole blood sample: the liquid that remains on the surface of the sample after whole blood is diluted with trichloroacetic acid and centrifuged, and after the solids from the whole blood sample sink to the bottom. The result was stated in the traditional grams to decileters, weight to volume. There was no stipulation or evidence adduced that testing on supernatant is a whole blood test or that the result is equivalent.

Furthermore, we take issue with the court's finding in ***Miller*** that because the defendant therein failed to introduce evidence (1) that centrifugation creates a higher concentration of alcohol in the supernatant, or (2) of the volume or mass of supernatant as a percentage of the sample of whole blood, he failed to rebut the "properly certified laboratory result." ***Miller*** at 10-11; ***see Commonwealth v Cook***, 865 A.2d 869 (Pa.Super. 2004) (Commonwealth's introduction of a properly certified laboratory report carried a rebuttable presumption of validity). No one disputed the accuracy of the laboratory result as a test of alcohol content of supernatant. The issue was whether the Commonwealth introduced legally sufficient evidence of whole blood alcohol content. We find disturbing the court's use of the presumption in ***Miller*** as a pretext to impermissibly shift the burden to the

defendant to produce evidence that the percentage of alcohol in the supernatant was different from the volume percentage in whole blood, and evidence of the mass of the supernatant as a percentage of the sample of whole blood. This Court has unequivocally held that it is the Commonwealth's burden to introduce evidence of a conversion factor that is scientifically accepted where testing is conducted on supernatant, plasma, or serum. ***See Brugger***, ***Karns***; ***Haight***; ***Renninger***. If, in fact, a particular test on supernatant produces a result that is equivalent to whole blood testing, then it is the Commonwealth's burden to introduce reliable and scientific evidence of a conversion factor of one or its statistical equivalent. Absent evidence of a conversion factor, the evidence of alcohol content in the supernatant was legally insufficient to support Appellant's convictions.

Judgment of sentence reversed. Appellant discharged. Case remanded. Jurisdiction relinquished.

Judgment Entered.



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Prothonotary

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