NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MATTHEW JOHNSON	:	
Appellant	:	No. 346 EDA 2021

Appeal from the Judgment of Sentence Entered November 30, 2020
In the Court of Common Pleas of Delaware County Criminal Division at
No(s): CP-23-CR-0000413-2020

BEFORE: BOWES, J., STABILE, J., and McCAFFERY, J.

MEMORANDUM BY BOWES, J.: **FILED MARCH 8, 2022**

Matthew Johnson appeals from his November 30, 2020 judgment of sentence imposed after the trial court convicted him of driving under the influence ("DUI")– general impairment and related offenses. We affirm the convictions, vacate the judgment of sentence in part, and remand with instructions.

On September 2, 2019, at approximately 2:00 a.m., Pennsylvania State Police Troopers Zachary Dombroski and Patrick Regan were patrolling I-95 in Delaware County when they encountered a red freightliner Cascadia hauling a white semi-trailer in the center lane. ***See*** N.T., 10/2/20, at 30-31. Trooper Dombroski observed the subject vehicle drift out of its lane of travel to the right, fully crossing the white dotted lines. ***Id***. at 31. After he saw the vehicle drift out of its lane several more times, Trooper Dombroski initiated a traffic stop by activating his vehicle's emergency lights and sirens. ***Id***. at 31. The

subject vehicle continued south for approximately one mile before stopping on the right shoulder at or near Exit 7. The vehicle's sole occupant was Appellant. ***Id***. at 40-41. The vehicle drifting out of its lane of travel and the ensuing interaction between Trooper Dombroski and Appellant was captured by the mobile video recorder ("MVR") on Trooper Dombroski's vehicle. ***Id***. at 32-34; ***see also*** Commonwealth Exhibit 1.

Trooper Dombroski approached the passenger side window, introduced himself, and explained that he had stopped the vehicle due to Appellant's repeated failure to maintain his lane of travel. ***See*** Commonwealth Exhibit 1. Appellant was eating food out of a Tupperware container and his actions were "slow and sluggish." N.T. 10/2/20, at 87-89. Appellant produced a valid driver's license, but was unable to provide vehicle registration, proof of insurance, or a logbook. Trooper Dombroski instructed Appellant to look for the documents while he returned to his vehicle to query records for the truck.

Since Appellant was unable to locate any information about his vehicle, Trooper Dombroski asked Appellant to stop eating and exit the vehicle. After a second approach and request to exit, Appellant complied with the Trooper's instructions. Trooper Dombroski attempted to issue two traffic citations. However, while he was explaining the citations to Appellant, Trooper Dombroski detected the odor of an alcoholic beverage emanating from Appellant's breath. Trooper Dombroski also noticed that Appellant's eyes

appeared glassy and bloodshot. When asked, Appellant admitted that he had consumed two beers earlier that evening in New Jersey.

Trooper Dombrowski retrieved the citations from Appellant and transitioned to field sobriety testing. The horizontal gaze nystagmus ("HGN") test indicated that Appellant was impaired, while the vertical gaze nystagmus test did not. ***Id***. at 55-60. Therefore, Trooper Dombroski intended to continue testing by employing the walk and turn test and the one-legged stand. However, Appellant declined to complete these tests, explaining that he had "weak legs." ***Id***. at 62. Since Appellant was unable to complete the field sobriety testing, Appellant agreed to take a portable breath test ("PBT"). However, all four attempts were unsuccessful after Appellant failed to follow instructions to make a proper seal with his mouth and provide a steady airflow. Based on his experience administering PBTs, Trooper Dombroski believed Appellant was purposefully attempting to evade the test. ***Id***. at 63-65. Accordingly, Trooper Dombroski placed Appellant under arrest for DUI and read him his chemical testing warnings for commercial vehicle blood tests. Appellant refused the blood draw. During an inventory search of the vehicle, Trooper Domobroski discovered a cooler with two unopened Heineken beer bottles.

Appellant filed a motion to suppress the field sobriety testing, request for a blood draw, and his arrest. The trial court held a suppression hearing, at which Trooper Dombroski testified and the Commonwealth played the MVR.

Following argument, the trial court denied Appellant's suppression motion. Appellant immediately proceeded to a stipulated non-jury trial based on the suppression hearing evidence for the offenses of DUI – general impairment; first offense; DUI while operating a commercial vehicle; failure to carry registration; operating a vehicle without required financial responsibility; disregarding traffic lane signals; and careless driving. Appellant elected not to testify, but trial counsel argued that Appellant's actions were the result of distracted driving, not alcohol impairment. The trial court found Appellant guilty of the aforementioned offenses.

On November 30, 2020, the court sentenced Appellant to six months of probation with restrictive conditions and a mandatory $500 fine for DUI while operating a commercial vehicle.[1] Appellant was also sentenced to pay $100 in court costs and $75 in mandatory fines for each of the four summary offenses. In total, Appellant was ordered to pay $800 in mandatory fines. Later the same day, Appellant made an oral post-sentence motion requesting an amended sentence, which the court granted. Appellant's DUI sentence was amended from probation to forty-eight hours to six months of confinement. All other aspects of the original sentence remained unchanged. Thereafter, Appellant filed a post-sentence motion which was denied. The instant appeal

---

[1] The convictions for DUI general impairment and DUI while operating a commercial vehicle merged for sentencing purposes.

followed. Both Appellant and the trial court complied with the mandates of Pa.R.A.P. 1925.

Appellant presents the following issues for our review:

> 1. Was the evidence insufficient to prove [Appellant] guilty beyond a reasonable doubt for the DUI offenses under 75 Pa.C.S. § 3802(a)(1) and 75 Pa.C.S. § 3802(f)(2)?
>
> 2. Did the trial court err and impose an illegal sentence when it ordered imposition of fines, without first assessing [Appellant's] ability to pay?

Appellant's brief at 4.

In his first claim, Appellant alleges that the evidence was insufficient to sustain his DUI convictions. ***See*** Appellant's brief at 8. Our standard of review when considering a challenge to the sufficiency of the evidence is:

> [w]hether 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. Gause, 164 A.3d 532, 540-41 (Pa.Super. 2017) (citations and quotation marks omitted).

> Our legislature has defined DUI – general impairment as follows:
>
> 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. § 3802(a)(1). DUI – commercial vehicles is defined, in relevant part, as follows:

> An individual may not drive, operate or be in actual physical control of the movement of a commercial vehicle, school bus or school vehicle in any of the following circumstances:
>
> . . . .
>
> (2) After the individual has imbibed 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. § 3802(f).

The crux of Appellant's argument is that Trooper Dombrowski's testimony, alone, was not enough to establish that Appellant was impaired by alcohol. ***See*** Appellant's brief at 11. Instead, Appellant contends that his actions were the result of distracted driving. ***Id***. The trial court disagreed and explained its reasoning as follows:

> The evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the Commonwealth as the verdict winner, is sufficient to support each element of those two offenses. The testimony of Trooper Dombroski in corroboration with the MVR video admitted as C-1 established that [Appellant] was guilty of violating 75 Pa.C.S. § 3802(a)(2). On six (6) occasions from the point at which Trooper Dombroski first observed the tractor-trailer operated by Appellant the passenger side rear wheels crossed entirely over the

> white hashmark lane markings into the right lane of travel from the center lane of travel where [Appellant] had positioned his vehicle. Once stopped, [Appellant] was slow to follow the command of Troper Dombroski and report to the rear tractor-trailer. Ultimately, when [Appellant] did make his way to the rear of the tractor-trailer, he did not produce documentation of vehicle registration or financial responsibility for the subject commercial vehicle. During his conversation with Trooper Dombroski, [Appellant] stated he had consumed two beers earlier that evening in New Jersey.
>
> Trooper Dombroski administered the [HGN] and attempted to conduct two additional field sobriety tests, the walk-and-turn and the one-leg stand. However, upon being offered these two field sobriety tests, [Appellant] asserted his legs were weak and declined these field tests. [Appellant] having declined the field tests, Trooper Dombroski then attempted to administer the [PBT] test to [Appellant]. The Trooper attempted the PBT test at least three (3) times to evaluate the Appellant's breath. However, in Trooper Dombroski's opinion, [Appellant] did not cooperate when he failed to breathe deeply enough through the straw-like hose into the PBT test unit.
>
> Consistent with the rationale supporting [Appellant's] conviction under 75 Pa.C.S. § 3802(a)(2), addressed above, the evidence also implicates a violation of 75 Pa.C.S. § 3802(f)(2) with the additional component that Appellant was operating a commercial vehicle. The record demonstrates [Appellant], an independent trucker, was operating a tractor trailer on September 2, 2019.

Trial Court Opinion, 3/5/21, at 18-20. Our review of the certified record supports the trial court's findings.

It is well-established that "a solitary witness's testimony may establish every element of a crime, assuming that it speaks to each element, directly and/or by rational inference." ***Commonwealth v. Johnson***, 180 A.3d 474, 479 (Pa.Super. 2018). Trooper Dombroski positively identified Appellant as the driver of the vehicle that repeatedly drifted out of its lane of travel. ***See***

N.T., 10/2/20, at 35-36, 42. He further testified about Appellant's signs of impairment, *i.e.*, his slow and sluggish response, bloodshot eyes, admission to drinking, smell of alcohol, evasiveness with the PBT, and the results of the HGN test. ***Id***. at 55, 59, 64-65, 86-87, 93. Additionally, Trooper Dombroski concluded that Appellant was attempting to conceal his alcohol consumption by eating food. ***Id***. at 66. Trooper Dombroski's testimony was corroborated by the MVR. ***See*** Commonwealth Exhibit 1. Accordingly, when viewed in the light most favorable to the Commonwealth, we find that the evidence was sufficient to establish Appellant's DUI convictions beyond a reasonable doubt.

In his second claim, Appellant contends that the court erroneously imposed mandatory fines for his DUI and summary convictions without first assessing his ability to pay, which he argues was in violation of 42 Pa.C.S. § 9726(c), Pa.R.Crim.P. 706(C), and the excessive fines clause of the Pennsylvania and United States Constitutions. ***See*** Appellant's brief at 17-42. Since this argument challenges the legality of Appellant's sentence, "[o]ur standard review over such questions is *de novo* and our scope of review is plenary." ***Commonwealth v. Wolfe***, 106 A.3d 800, 802 (Pa.Super. 2014). For the reasons that follow, we find that § 9726(c) does not apply to mandatory fines, Rule 706(C) does not require an ability to pay hearing until incarceration for failure to pay is at issue, and 75 Pa.C.S. § 3804(b)(1)(ii) does not violate the excessive fines clauses of the Pennsylvania and United

States Constitutions. However, since the court did not impose the correct mandatory fines for the summary offenses, we remand for resentencing.

For ease of review, we consider Appellant's challenges to the DUI fine and summary conviction fines separately. First, we set forth the statutory provisions at issue in this appeal as they pertain to Appellant's DUI conviction. Section 9726(c) provides, in relevant part, as follows: "The court shall not sentence a defendant to pay a fine unless it appears of record that: (1) the defendant is or will be able to pay the fine[.]" 42 Pa.C.S. § 9726(c). Rule 706(C) states: "The court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means, including the defendant's ability to make restitution or reparations." Pa.R.Crim.P. 706(C). Finally, § 3804(b)(1)(ii) indicates that "an individual who violates section 3802 . . .(f) **shall** be sentenced as follows: (1) For a first offense, to: . . . (ii) pay a fine of not less than $500 nor more than $5,000[.]" 75 Pa.C.S. § 3804(b)(1)(ii) (emphasis added).

Appellant concedes that the $500 fine imposed here was required by 75 Pa.C.S. § 3804(b)(1)(ii), but nevertheless asserts that § 3804, § 9726, and Rule 706(C) must be read together such that a mandatory fine can be imposed only if the defendant can afford it. ***See*** Appellant's brief at 15-31. We disagree.

Recently, we reiterated the long-held rule that § 9726(c) does not apply to mandatory fines. ***Commonwealth v. May***, ___ A.3d ___, 2022 WL 453581 *4 (Pa.Super. 2022) (citing ***Commonwealth v. Gipple***, 613 A.2d 600, 601 n.1 (Pa.Super. 1992) (finding that § 9726(c) did not apply to mandatory fines)). Instead, we held in ***May*** that the ability to pay inquiry of § 9726(c) is required only for non-mandatory fines. ***Id***. (citing ***Commonwealth v. Ford***, 217 A.3d 824, 829 (Pa. 2018)). Second, we relied on relevant authority confirming that Rule 706(C) only required the court to hold an ability-to-pay hearing when a defendant faced incarceration for failure to pay court costs previously imposed on him. ***Id***. at *5-*6 (citing ***Commonwealth v. Childs***, 63 A.3d 323, 326 (Pa.Super. 2013)). Finally, we analyzed 75 Pa.C.S. § 3804(c)(1)(ii), conducted a proportionality analysis and concluded that § 3804(c)(1)(ii), which imposes a fine of $1,000 to $5,000, did not violate the excessive fines clause of the Pennsylvania Constitution. ***See id***. at *6-*8 (citing ***Commonwealth v. Eisenberg***, 98 A.3d 1268, 1279 (Pa. 2014) (finding a statute mandating a $75,000 fine for a $200 theft was disproportionate to the offense and, therefore, violated the excessive fine clause of the Pennsylvania Constitution)).

Herein, as in ***May***, Appellant was ordered to pay a mandatory fine pursuant to § 3804. Appellant also did not yet face incarceration for failure to pay the mandatory fine. Thus, § 9726 and Rule 706(C) are inapplicable. Appellant's final argument, that § 3804(b)(1)(ii) violated the excessive fines

clause, must also fail for the reasons outlined in ***May***. ***See May***, ***supra*** at *6-*8. The fact that Appellant's conviction involved a different subsection of § 3804 than the subsection analyzed in ***May*** does not alter our analysis.

In ***May***, we considered § 3804 as a whole and found that since it distinguished DUI punishments based upon the specific circumstances of each case § 3804 was "tailored, scaled, and in the strictest sense calculated to the offenses." ***Id***. (quoting ***Eisenberg***, ***supra*** at 1287). Furthermore, the mandatory $500 DUI fine at issue in this case is significantly less than the $1,000 DUI fine upheld in ***May***. A $500 fine is proportional to the crime, since it is unlikely to deprive Appellant of his livelihood and the Commonwealth has a compelling interest in protecting its citizens from the dangers posed by impaired driving. ***Id***. at *8 (citing ***Commonwealth v. Tarbert***, 535 A.2d 1035, 1042 (Pa. 1987)). Appellant's arguments contradict ***May*** and therefore must fail. ***See Commonwealth v. Reed***, 107 A.3d 137, 143 (Pa.Super. 2014) ("This Court is bound by existing controlling precedent as long as the decision has not been overturned by our Supreme Court."). Therefore, no relief is due on Appellant's arguments surrounding the DUI fine.[2]

---

[2] Public Justice and the American Civil Liberties Union have filed *amicus curiae* briefs in support of Appellant's position. However, their arguments are more properly addressed to this Court *en banc* or to our Supreme Court, as we lack the authority to overrule ***May*** or to make policy determinations.

Appellant also argues that the mandatory fines imposed as a result of his summary convictions ran afoul of § 9726 and Rule 706(C).[3] However, these arguments also fail for the reasons outlined in ***May***. Nevertheless, we are constrained to vacate and remand for resentencing since the trial court erroneously calculated the mandatory fines at issue for Appellant's four summary convictions.

Specifically, 75 Pa.C.S. § 1786(f) governed Appellant's conviction for failure to provide proof of his vehicle registration and required the court to sentence him to pay a $300 fine:

> Any owner of a motor vehicle for which the existence of financial responsibility is a requirement for its legal operation shall not operate the motor vehicle or permit it to be operated upon a highway of this Commonwealth without the financial responsibility required by this chapter. In addition to the penalties provided by subsection (d), any person who fails to comply with this subsection commits a summary offense and **shall**, upon conviction, be sentenced to pay a fine of $300.

75 Pa.C.S. § 1786(f) (emphasis added). Since the remaining summaries did not provide for any penalty within 75 Pa.C.S. §§ 1311(b), 3309(1), or 3714(a), the court was required to impose a twenty-five-dollar fine for each one in accordance with 75 Pa.C.S. § 6502(a):

> It is a summary offense for any person to violate any of the provisions of this title unless the violation is by this title or other statute of this Commonwealth declared to be a misdemeanor or felony. Every person convicted of a summary offense for a

---

[3] Since Appellant does not reference or make any specific constitutional argument targeting the summary fines at issue, we do not address the constitutionality of those statutes herein.

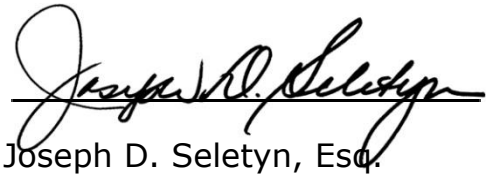
> violation of any of the provisions of this title for which another penalty is not provided **shall** be sentenced to pay a fine of $25.

75 Pa.C.S. § 6502(a) (emphasis added).

In accordance with § 1786(f) and § 6592(a), and as acknowledged by Appellant and the trial court, Appellant was required to pay a $300 fine for failing to provide proof of his vehicle registration, not seventy-five dollars. ***See*** 75 Pa.C.S. § 1786(f) (requiring a $300 fine); ***See also*** Trial Court Opinion, 3/5/21, at 24 (finding that the case should be remanded for imposition of the higher fine); ***see also*** Appellant's brief at 15 n.1. Further, since the remaining summary convictions did not provide for any penalty within 75 Pa.C.S. §§ 1311(b), 3309(1), or 3714(a), the court was required to impose three twenty-five-dollar fines, not three seventy-five-dollar fines. ***See*** 75 Pa.C.S. § 6502(a) (mandating a twenty-five-dollar fine for summary violations of Title 75 where not otherwise specified). Thus, Appellant should have been fined a total of $375 for his summary convictions, not $300. Accordingly, we vacate the fines portion of Appellant's sentence and remand so that the sentencing court can impose the aggregate $875 in fines that were mandated by statute.

Convictions affirmed. Judgment of sentence vacated in part. Case remanded with instructions. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/8/2022