NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JAMIE REED Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2188 EDA 2012

Appeal from the Judgment of Sentence July 9, 2012
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0002190-2012

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J. Filed: February 26, 2013

Jamie Reed appeals from the judgment of sentence entered in the Court of Common Pleas of Delaware County following his convictions for driving under the influence of alcohol;[1] driving under the influence of a combination of alcohol and a controlled substance;[2] and driving without a license.[3] After careful review, we affirm on the opinion authored by the Honorable Patricia H. Jenkins.

On January 5, 2012, on a cold dry night, Reed crashed his car into two parked cars on a residential street in Chester, Pennsylvania, overturning his

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[1] 75 Pa.C.S.A. § 3802(a)(1).

[2] 75 Pa.C.S.A. § 3802(d)(3).

[3] 75 Pa.C.S.A. § 1501.

vehicle and causing substantial damage to the parked cars. The owner of one of the parked cars ("Owner") called police, ran to the overturned car and saw Reed, the sole occupant, crawl out of the car window. Owner said she recognized the smells of alcohol and marijuana on Reed's person. Reed repeatedly said to Owner that he "need[ed] to get out of [there]." N.T. Trial, 6/27/2012, at 11. Reed attempted to leave, but Owner held onto Reed's wrist and kept him at the scene until the police arrived.

Chester Police Officer Arthur Grenier ("Officer Grenier") arrived at the scene in response to Owner's 911 call. Officer Grenier observed that Reed, who did not have a valid driver's license, had "bloodshot eyes" and "slurred speech;" that Reed was "swaying back and forth;" and that he had to lean on the police vehicle to "keep himself upright." ***Id.*** at 34. Officer Grenier stated that Reed could not perform field sobriety tests because he was "unsteady on his feet." ***Id.*** Officer Grenier asked Reed what had happened, and Reed responded that he "whipped a turn and hit a parked car." ***Id.*** at 35. Officer Grenier asked Reed if he had been drinking; Reed answered that he "just got done smoking some weed." ***Id.***

Reed agreed to laboratory blood testing. Reed's blood was tested for alcohol but not for marijuana. Reed stipulated that his blood-test analysis showed that he had a blood alcohol level of .07%.

At the time of Reed's arrest, Officer Grenier had been on the police force for ten months; he received a 6-month basic training in driving under the influence (DUI) investigations at the Delaware County Police Academy,

and participated in at least six DUI investigations. Based on his observations at the scene of the accident, Officer Grenier concluded that Reed was not capable of safely operating a motor vehicle due to his intoxication caused by ingestion of alcohol and marijuana.

Following a non-jury trial held on June 27, 2012, the Court found Reed guilty of driving under the influence of alcohol; driving under the influence of a combination of alcohol and a controlled substance; and driving without a license. On July 9, 2012, Judge Jenkins imposed the following sentence for driving under the combined influence of alcohol and a controlled substance: three to six months' incarceration; 80 hours of community service; a mandatory minimum fine of $1,000; restitution; and costs and fees. The court also ordered him to complete safe driving classes.[4] In addition, the court imposed a fine of $200 for driving without a license.

This timely appeal follows, in which Reed raises one issue for our review:

> Whether the evidence was insufficient to sustain the conviction for driving under the influence of alcohol or controlled substance under 75 Pa.C.S.A. §3802(a)(1) and (d)(3) where the Commonwealth failed to prove beyond a reasonable doubt that . . . Reed was impaired to a degree that rendered him incapable of safely operating a motor vehicle as a result of ingesting alcohol, or a combination of drugs and alcohol.

Brief of Appellant, at 4.

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[4] The conviction for driving under the influence of alcohol merged for sentencing purposes.

Reed challenges his convictions under the following statute:

> **§ 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.
>
> ...
>
> **(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:
>
> ...
>
> (3) The individual is under the combined influence of alcohol and 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.

75 Pa.C.S.A. § 3802.

Reed claims that the Commonwealth should have presented expert testimony to sustain a conviction under 75 Pa.C.S.A. § 3802(d)(3), driving under the influence of a combination of alcohol and a controlled substance. Reed argues that there was insufficient evidence to support his DUI convictions and that, therefore, the judgment of sentence for DUI should be vacated.

In her Pa.R.A.P. 1925(a) opinion, Judge Jenkins analyzes Reed's claims and correctly determines that: (1) Reed was operating the motor vehicle that struck two parked cars on the evening of January 5, 2012; (2)

Reed was substantially impaired while operating the motor vehicle and was incapable of safe driving; (3) based on the totality of the circumstances, the evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, proves beyond a reasonable doubt that Reed was driving under the influence of a combination of alcohol and marijuana; and (4) the evidence obviates any need for expert testimony regarding the causal nexus between Reed's ingestion of marijuana and his inability to operate a motor vehicle safely.

After careful review of the parties' briefs, the record and the relevant law, we agree with Judge Jenkins' analysis and affirm on the basis of her opinion. We instruct the parties to attach a copy of Judge Jenkins' decision in the event of further proceedings.

Judgment of sentence affirmed.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA, CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	**NO. 2190-12**
v.	:	
JAMIE REED,	:	
Defendant	:	

Michelle Hutton, Esquire, Attorney for the Commonwealth of Pennsylvania

Steven Papi, Esquire, Attorney for Jamie Reed

OPINION

JENKINS, J. **FILED:** 10/11/12

In this direct appeal, Jamie Reed contends that the evidence was insufficient to support his convictions for driving under the influence of alcohol (of 75 Pa.C.S. § 3802(a)(1)) or a combination of drugs and alcohol (of 75 Pa.C.S. § 3802(d)(3)).

Reed smashed his vehicle into two parked cars on a city street in Chester, Pennsylvania. His vehicle was overturned, and the two parked cars incurred substantial damage. The owner of one parked car smelled alcohol and marijuana on Reed's person, and the police officer who arrived on the scene minutes after the accident observed that Reed had bloodshot eyes, slurred speech, swayed back and forth on his feet, had to lean on the police vehicle to remain upright, and was not able to perform field sobriety tests. When the officer asked if Reed had been drinking, Reed replied that he "just got done smoking some weed." Blood tests later revealed that Reed had a blood alcohol level of

.07%. This evidence supports Reed's convictions under both § 3802(a)(1) and § 3802(d)(3). His judgment of sentence[1] should be affirmed.

The lone issue in this appeal is a challenge to the sufficiency of the evidence under § 3802(a)(1) and § 3802(d)(3). When reviewing challenges to the sufficiency of the evidence, Pennsylvania appellate courts must view all the evidence and all reasonable inferences therefrom in the light most favorable to the Commonwealth, the verdict winner. *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751 (2000). The evidence is sufficient to support the verdict when it establishes each material element of the crime charged against the defendant beyond a reasonable doubt. *Id.* In applying the above test, the appellate court "may not weigh the evidence and substitute [its] judgment for the fact-finder." *Commonwealth v. Cassidy,* 447 Pa. Super. 192, 668 A.2d 1143, 1144 (1995). "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. Cunningham,* 805 A.2d 566, 571 (Pa. Super. 2002), *alloc. denied,* 573 Pa. 663, 820 A.2d 703 (2003).

Construed under this standard, the evidence adduced during Reed's non-jury trial was as follows: the evening of January 5, 2012 was cold and dry in the City of Chester. N.T., 6/27/12, p. 30. Keena Ford was in her residence on West 3rd Street when she heard a loud crash. N.T., 6/27/12, pp. 9-10. She looked outside and saw an overturned car, and she ran outside with her daughter to help. N.T., 6/27/12, pp. 9-10. She also called 911. N.T., 6/27/12, p. 11.

[1] The Court sentenced Reed to 3-6 months imprisonment for driving under the influence of a combination of drugs and alcohol consecutive to a sentence he was serving in an unrelated case. His conviction for driving under the influence of alcohol merged for sentencing purposes. The Court also imposed fines, restitution, costs and fees and directed Reed to perform 80 hours of community service.

Reed, the lone occupant of the car, crawled out of the window and said repeatedly that "he needed to get out of here." N.T., 6/27/12, p. 11. Reed's car had struck and damaged Ford's car and a second car. N.T., 6/27/12, pp. 11-15. Ford told Reed he had to stay and wait for the police because he had collided with these cars. N.T., 6/27/12, pp. 11-15.

Reed attempted to leave, and Ford held onto Reed's arm as he tried to escape. N.T., 6/27/12, pp. 14-15. Ford was familiar with the smells of alcohol and marijuana, and she smelled both alcohol and marijuana on Reed's person. N.T., 6/27/12, pp. 14, 28-29.

Chester Police Officer Grenier arrived shortly after Ford's 911 call. N.T., 6/27/12, p. 32. Officer Grenier observed that Reed had bloodshot eyes, slurred speech, and was unsteady on his feet. N.T., 6/27/12, pp. 34, 43, 45, 52. He had to lean on the side of the police vehicle to remain upright. N.T., 6/27/12, p. 34. He could not perform field sobriety tests because he was so unsteady. N.T., 6/27/12, pp. 34, 43. Officer Grenier asked Reed what happened, and Reed answered: "Whipped a turn and hit a parked car." N.T., 6/27/12, pp. 34-35. The officer asked if Reed had been drinking, and Reed replied, "I just got done smoking some weed." N.T., 6/27/12, pp. 34-35.

Officer Grenier arrested Reed and transported him to the hospital, where he agreed to blood tests. N.T., 6/27/12, p. 37. Reed's blood alcohol level was .07%. Exhibit C-11. There were no laboratory tests for marijuana.

Based on his observations at the scene of the accident, Officer Grenier opined that Reed was not capable of safely operating a motor vehicle due to intoxication caused by ingestion of alcohol and marijuana. N.T., 6/27/12, pp. 38-39.

75 Pa.C.S. § 3802(a)(1) provides: "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." To prove a violation of this provision, the Commonwealth must demonstrate beyond a reasonable doubt that (1) the defendant was operating a motor vehicle (2) after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving. *Commonwealth v. Kerry*, 906 A.2d 1237, 1241 (Pa. Super. 2006).

The Commonwealth proved the first element of § 3802(a)(1) by demonstrating that Reed was operating the motor vehicle on the evening of January 5, 2012 that smashed into Ford's car and another car on West 3rd Street in Chester. Ford heard a loud crash and saw an overturned car outside of her house. She ran outside and saw that Ford was the only occupant of the car. She also saw him crawl out of the window. Reed admitted to Officer Grenier that he was the driver by saying that he "whipped a turn and hit a parked car."

To establish the second element of § 3802(a)(1),

> the Commonwealth must prove that alcohol has substantially impaired the normal mental and physical faculties required to operate the vehicle safely; 'substantial impairment' means a diminution or enfeeblement in the ability to exercise judgment, to deliberate or to react prudently to changing circumstances and conditions. *Commonwealth v. Gruff,* 822 A.2d 773, 781, (Pa. Super. 2003), *appeal denied,* 581 Pa. 672, 863 A.2d 1143 (2004). '[The] meaning [of substantial impairment] is not limited to some extreme condition of disability.' *Commonwealth v. Griscavage,* 512 Pa. 540, 545, 517 A.2d 1256, 1258 (1986). Section 3802(a)(1), like its predecessor, 'is a general provision and provides no specific restraint upon the Commonwealth in the manner in which it may prove that an accused operated a vehicle under the influence of alcohol to a degree which rendered him incapable of safe driving.' *Commonwealth v. Loeper,* 541 Pa. 393, 402–403, 663 A.2d 669, 673–674 (1995).

Kerry, supra, 906 A.2d at 1241. 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. Blood alcohol level may be added to this list, although it is not necessary and the two hour time limit for measuring blood alcohol level does not apply. Blood alcohol level is admissible in a subsection 3801(a)(1) case only insofar as it is relevant to and probative of the accused's ability to drive safely at the time he or she was driving. The weight to be assigned these various types of evidence presents a question for the fact-finder, who may rely on his or her experience, common sense, and/or expert testimony. Regardless of the type of evidence that the Commonwealth proffers to support its case, the focus of subsection 3802(a)(1) remains on the inability of the individual to drive safely due to consumption of alcohol-not on a particular blood alcohol level.

Commonwealth v. Segida, 604 Pa. 103, 985 A.2d 871, 879 (2009).

The evidence demonstrates that Reed was substantially impaired while driving his car and was incapable of safe driving. He caused a serious automobile accident by striking and damaging two parked cars on a city street and flipping his own car. He admitted that the accident occurred because he "whipped a turn". He exhibited numerous signs of intoxication and impaired judgment at the scene of the accident – a palpable odor of alcohol, slurred speech, difficulty standing upright, bloodshot eyes, and inability to perform field sobriety tests. His BAC, taken shortly after his arrest, was .07%. This evidence resembles many other cases in which courts have held the evidence sufficient to sustain a DUI conviction under § 3802(a)(1) or its predecessor, 75 Pa.C.S. § 3731(a)(1). *Segida, supra*, 985 A.2d at 880 (evidence established that defendant drove while he was incapable of driving safely due to ingestion of alcohol; defendant admitted to police officer at scene of one-vehicle accident that he had been drinking at local club and that he was driving himself and his brother home when he lost control of his vehicle, officer

smelled strong odor of alcohol coming from defendant's person and his breath, defendant performed very badly on field sobriety tests, blood alcohol test at hospital revealed very high blood alcohol content of 0.326 percent, and officer opined that "due to traffic on the road" it was "doubtful" that accident had occurred two or three hours or even ten minutes prior to his arrival on the scene); *Commonwealth v. Karns*, -- A.3d --, 2012 WL 3055787, *6 (Pa. Super., 7/27/12) (arresting police officer observed defendant's vehicle twice drift across center line, during traffic stop defendant's eyes appeared bloodshot and his speech slurred, and defendant failed field sobriety tests); *Commonwealth v. Mobley*, 14 A.3d 887, 890 (Pa. Super. 2011) (defendant failed to stop at stop sign despite police officer's cruiser being in full view, failed four field sobriety tests and was unable to recite alphabet, and officer observed strong odor of alcohol emanating from defendant's vehicle and defendant's slurred speech); *Kerry*, *supra*, 906 A.2d at 1241 (defendant's actions in illegally operating all terrain vehicle on highway on snow covered roads evidenced diminution or enfeeblement in ability to exercise judgment; he concealed four cans of beer on his person, had bloodshot and glassy eyes, slurred speech, and odor of alcohol, and refused to submit to breath test); *Commonwealth v. Hartle*, 894 A.2d 800, 804-05 (Pa. Super. 2006) (officer noticed very strong odor of alcohol emanating from defendant's breath, defendant's eyes were bloodshot and glassy and he kept repeating that he was just following friends, and while standing outside vehicle, defendant swayed in a circular motion and refused to submit to breath test); *Gruff*, *supra*, 822 A.2d at 781-82 (defendant had bloodshot eyes, smelled of alcohol, gave inappropriate responses, refused to take blood test, and drove at high rate of speed); *Commonwealth v. O'Bryon*, 820 A.2d 1287 (Pa. Super. 2003) (defendant ran her car into parked car and left scene, was confused and

staggering, had alcohol on breath, and could not maintain balance); *Commonwealth v. Leighty,* 693 A.2d 1324 (Pa. Super. 1997) (defendant had glassy and bloodshot eyes, admitted alcohol consumption, failed two field sobriety tests and had minor accident before arrest); *Commonwealth v. Feathers,* 442 Pa. Super. 490, 660 A.2d 90 (1995), *affirmed,* 546 Pa. 139, 683 A.2d 289 (1996) (defendant had glassy eyes and slurred speech, staggered as she walked, smelled of alcohol and failed field sobriety tests); *Commonwealth v. Rishel,* 441 Pa. Super. 584, 658 A.2d 352 (1995) (defendant smelled of alcohol, appeared confused, was involved in automobile accident, failed two field sobriety tests and admitted to consuming two 16–ounce beers), *vacated on other grounds,* 546 Pa. 48, 682 A.2d 1267 (1996).

75 Pa.C.S. § 3802(d)(3) provides: "An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances. . .the individual is under the combined influence of alcohol and 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."

The analysis on pages 4-7 demonstrates that Reed was under the influence of alcohol that impaired his ability to drive his vehicle safely. There also was evidence that Reed was under the influence of marijuana. Ford testified that she smelled marijuana on Reed's person at the accident scene, and Reed admitted to Officer Grenier that he "just got done smoking some weed." Thus, common sense dictates that Reed was under the combined influence of alcohol and marijuana while driving his motor vehicle.

It was not necessary for the Commonwealth to present expert testimony that Reed's ingestion of marijuana impaired his ability to drive. *See Commonwealth v.*

Griffith, -- Pa. --, 32 A.3d 1231 (2011); *Commonwealth v. Hutchins*, 42 A.3d 302 (Pa. Super. 2012). In *Griffith*, the Supreme Court held that expert testimony is not mandatory in every DUI prosecution. Instead, the need for expert testimony "must be evaluated on a case-by-case basis, taking into account not just the specific drug at issue, prescription or otherwise, but also the nature and overall strength of the Commonwealth's evidence." *Id.*, 32 A.3d at 1239. The Supreme Court held that the evidence in *Griffith* was sufficient to sustain the defendant's DUI conviction without expert testimony:

> An experienced police officer closely observed [the defendant's] behavior, demeanor, unsteadiness, and inability to perform field sobriety tests, all of which led him to request laboratory tests for the detection of controlled substances in [the defendant's] blood. [The defendant] admitted taking one prescription medication in the morning of the day of her arrest. Two other Schedule IV controlled substances, to wit, Valium and an active metabolite thereof, were detected in her blood.

Id. at 1240.

In *Hutchins*, the Superior Court affirmed the defendant's conviction for driving under the influence of marijuana. The defendant argued that blood test results showing the presence of marijuana metabolites in his blood stream, without any expert explanation, failed to establish that he was under the influence of a controlled substance at the time he was driving. The Superior Court agreed that the blood test results were inadmissible without expert testimony but found that four other pieces of evidence, viewed together, established his guilt: (1) despite having been in a serious accident in which his three daughters were injured, the defendant was unusually calm when talking to an investigating police officer; (2) the defendant admitted to smoking marijuana earlier in the day; (3) marijuana was found in the defendant's vehicle at the accident scene; and (4) the defendant was at fault for the accident by turning directly into on-coming traffic.

Id., 42 A.3d at 308. Consequently, expert testimony was not necessary to prove the defendant guilty of driving under the influence of marijuana.

In view of *Griffith* and *Hutchins*, it was not necessary for the Commonwealth to present expert testimony that Reed's ingestion of marijuana impaired his ability to drive. The totality of the circumstances – the serious accident in which Reed drove into two parked cars and overturned his own car, Reed's conduct at the accident scene, his odor of alcohol and marijuana, bloodshot eyes, slurred speech, inability to stand properly, inability to perform field sobriety tests, his admission that he recently smoked marijuana, and his BAC of .07% -- proves beyond a reasonable doubt that he was driving under the influence of a combination of alcohol and marijuana. This evidence was strong enough to obviate any need for expert testimony concerning the causal nexus between his ingestion of marijuana and his inability to drive safely.[2]

For the foregoing reasons, Reed's judgment of sentence should be affirmed.

BY THE COURT:

JENKINS, J.

[2] The Superior Court's decision in *Commonwealth v. Etchison,* 916 A.2d 1169 (Pa. Super. 2007), is distinguishable from the present case. In *Etchison,* the Superior Court reversed the defendant's conviction for driving under the influence of a drug or combination of drugs because the Commonwealth's expert witness admitted that the presence of marijuana metabolites in the defendant's blood did not indicate present impairment but only ingestion of a substance sometime previously. *Id.*, 916 A.2d at 1172. The Superior Court also reversed the defendant's conviction for driving under the influence of a combination of drugs and alcohol, reasoning that the facts might have established that he was under the influence of alcohol but did not demonstrate the combined influence of alcohol and a drug. *Id.*

Etchison was decided before the Supreme Court issued *Griffith*, so it no longer is good law to the extent it imposed more rigorous expert testimony requirements than *Griffith*. Moreover, the evidence of marijuana impairment is stronger in the present case than in *Etchison*. The defendant in *Etchison* merely had marijuana metabolites in his system, which did not necessarily indicate present impairment. *Id.*, 916 A.2d at 1172. Reed had a palpable odor of marijuana at the accident scene and admitted to recently smoking marijuana – facts which, in this Court's opinion, made expert testimony unnecessary.