NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JACK J. JAROSZ, JR., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 372 WDA 2012

Appeal from the Judgment of Sentence entered August 17, 2011,
in the Court of Common Pleas of Bedford County,
Criminal Division, at No(s): CP-05-CR-0000316-2008

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

MEMORANDUM BY ALLEN, J.: Filed: February 22, 2013

Jack J. Jarosz ("Appellant") appeals from the judgment of sentence imposed after he was found guilty of homicide by vehicle, accident involving death or injury while not properly licensed, accident involving death, driving on roadways laned for traffic, careless driving, driving with a suspended license (DUI related), failing to stop and give information or render aid, and abandoning a vehicle on the highway.[1] We affirm.

The trial court summarized the pertinent facts as follows:

> The case arose out of a motor vehicle crash on July 3, 2008. The evidence produced at trial demonstrated that [Appellant] left his lane of travel on State Route 31, and collided

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[1] 75 Pa.C.S.A. §§ 3732, 3742.1(b)(2), 3742(a), 3309(1); 3714(c), 1543(b)(1), 3744(a) and 3712(a).

* Retired Senior Judge assigned to the Superior Court.

> with a vehicle in the westbound lane of State Route 31. The collision occurred in Harrison Township of Bedford County. After the collision, [Appellant] fled the scene without offering aid or assistance, or identifying himself. The driver of the other vehicle received fatal injuries, and expired at the hospital on July 15, 2008. On the date in question, [Appellant] did not possess a valid driver's license and his privileges had been suspended DUI related since 2005. [Appellant] has not had a valid license since 1992.

Trial Court Opinion, 2/6/12, at 2.

Appellant was charged with the aforementioned crimes. A jury trial commenced on June 16, 2011. On June 17, 2011, the jury found Appellant guilty of homicide by vehicle, accident involving death while not properly licensed, and accident involving death. That same day, the trial court found Appellant guilty of driving on roadways laned for traffic, careless driving, driving with a suspended license (DUI related), failing to stop and give information or render aid, and abandoning a vehicle on a highway. On August 17, 2011, the trial court sentenced Appellant to fourteen months to five years for homicide, twenty months to five years for accident involving death while not properly licensed, one to five years for accident involving death, and sixty days for driving with a suspended license (DUI related). All sentences were imposed consecutively for an aggregate sentence of four to fifteen years. In addition, Appellant was sentenced to pay a fine of $500 for abandoning his vehicle. The remaining crimes of failure to stop and give information or render aid, roadways laned for traffic, and careless driving merged for sentencing purposes.

Appellant filed a post-sentence motion on August 29, 2011. By order dated February 3, 2012 and filed on February 6, 2012, the trial court denied Appellant's post-sentence motion. Appellant filed a notice of appeal on February 22, 2012. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues for our review:

> I. WHETHER IT WAS PREJUDICIAL TO THE POINT OF REVERSIBLE ERROR FOR THE TRIAL COURT TO ALLOW THE COMMONWEALTH TO ASK [APPELLANT] IF HE HAD CONSUMED ALCOHOL PRIOR TO DRIVING WHEN THERE WAS NO EVIDENCE TO SUPPORT SUCH A QUESTION?
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> II. WHETHER THE VERDICT WAS INSUFFICIENT TO SUSTAIN A CONVICTION TO COUNT 1— HOMICIDE BY VEHICLE— WHEN NO EXPERT COULD TESTIFY HOW THE ACCIDENT HAPPENED AND WHO WAS THE CAUSE OF THE ACCIDENT?

Appellant's Brief at 3.

Before we consider the merits of Appellant's claims, we must address the timeliness of Appellant's appeal. Pennsylvania Rule of Criminal Procedure 720 provides, in pertinent part:

> (A) Timing.
>
> > (1) Except as provided in paragraphs (C) and (D), a written post-sentence motion shall be filed no later than 10 days after imposition of sentence.
> >
> > (2) If the defendant files a timely post-sentence motion, the notice of appeal shall be filed:
> >
> > > (a) within 30 days of the entry of the order deciding the motion;

(b) within 30 days of the entry of the order denying the motion by operation of law in cases in which the judge fails to decide the motion; ...

(B) Optional Post-Sentence Motion.

* * *

(3) Time Limits for Decision on Motion. The judge shall not vacate sentence pending decision on the post-sentence motion, but shall decide the motion as provided in this paragraph.

(a) Except as provided in paragraph (B)(3)(b), the judge shall decide the post-sentence motion, including any supplemental motion, within 120 days of the filing of the motion. If the judge fails to decide the motion within 120 days, or to grant an extension as provided in paragraph (B)(3)(b), the motion shall be deemed denied by operation of law.

(b) Upon motion of the defendant within the 120-day disposition period, for good cause shown, the judge may grant one 30-day extension for decision on the motion. If the judge fails to decide the motion within the 30-day extension period, the motion shall be deemed denied by operation of law.

(c) When a post-sentence motion is denied by operation of law, the clerk of courts shall forthwith enter an order on behalf of the court, and, as provided in Rule 114, forthwith shall serve a copy of the order on the attorney for the Commonwealth, the defendant's attorney, or the defendant if unrepresented, that the post-sentence motion is deemed denied. This order is not subject to reconsideration.

(d) If the judge denies the post-sentence motion, the judge promptly shall issue an order and

> the order shall be filed and served as provided in Rule 114. …

The record in this case indicates that the judgment of sentence was imposed on August 17, 2011.[2] Appellant timely filed his post-sentence motion on Monday, August 29, 2011. *See* Pa.R.Crim.P. 720(A)(1). Pursuant to Pa.R.Crim.P. 720(B)(3)(a), the trial court had 120 days from the filing of the post-sentence motion to issue its decision. That 120 day period expired on December 27, 2011.

Upon the expiration of the 120 day period, the clerk of courts was required to enter an order denying the post-sentence motion by operation of law. *See* Pa.R.Crim.P. 720(B)(3)(b). The clerk of courts did not enter such an order. Instead, on February 3, 2012, the trial court entered an order denying Appellant's post-sentence motion. Appellant filed a notice of appeal on February 22, 2011.

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[2] ***See Commonwealth v. Green***, 862 A.2d 613, 617 (Pa. Super. 2004) (pursuant to Pa.R.Crim.P. 720(A)(1), a written post-sentence motion must be filed no later than 10 days after the date of imposition of sentence pronounced in open court not the date the sentence was entered on the docket).

Here, a hearing on the post-sentence motion was originally scheduled for November 14, 2011. However, Appellant's counsel sought a continuance, which the trial court granted, and the hearing convened on December 8, 2011 (101 days after the filing of the post-sentence motion). Appellant did not file a petition for a thirty-day extension pursuant to Pa.R.Crim.P. 720(B)(3)(b).

Because the trial court did not enter an order denying the post-sentence motion before the expiration of 120 days, Appellant's post-sentence motion was deemed denied by operation of law on December 27, 2011. Consequently, the trial court was without authority to rule on the post-sentence motion on February 3, 2012. ***See Commonwealth v. Khalil***, 806 A.2d 415, 420-421 (Pa. Super. 2002) (trial court orders entered after expiration of 120 days were a legal nullity since the post-sentence motions were already deemed denied by operation of law). The trial court's order denying Appellant's post-sentence motion on February 3, 2012 was therefore a nullity because the trial court's jurisdiction ended on December 27, 2011. Appellant had 30 days from December 27, 2011 to appeal. Thus, the appeal filed on February 22, 2012 was untimely.

However, this Court has determined that "we will address an otherwise untimely appeal if fraud or breakdown in the trial court's processes resulted in an untimely appeal." ***Khalil***, 806 A.2d at 420-421 (citations omitted). In particular, we explained in ***Khalil*** that the failure of the clerk of courts to issue an order deeming the appellant's post-sentence motions denied by operation of law, constitutes such a breakdown of the processes of the trial court. ***Id***. Where such a failure of the clerk of courts deprives the appellant of notice to protect his direct appeal rights and causes the appellant to file an untimely appeal, we will address the merits of the appeal. ***Id***. Accordingly, we proceed to address the merits of Appellant's appeal.

In his first issue, Appellant argues that the trial court erred in allowing the Commonwealth, on cross-examination, to ask Appellant whether he had consumed alcohol prior to the accident. Appellant's Brief at 7-9; N.T., 6/17/11, at 58-59, 68, 107. Appellant argues that the Commonwealth had no evidence that Appellant had been drinking, and that this line of questioning was prejudicial to Appellant. *Id*. Appellant refers specifically to the following exchange:

Assistant District Attorney:	[Y]ou came from Route 96, right, from the Schellsburg Shawnee lake area?
Appellant:	Yes.
	* * *
Assistant District Attorney:	So when you were at Shawnee Lake area you would stop at the bar at Shawnee? Actually you weren't at the lake; true?
Appellant:	No.
Assistant District Attorney:	Okay. And you weren't headed towards Manns Choice to one of the two bars there; were you.
Appellant:	No.
Assistant District Attorney:	Not that you remember?
Appellant:	Not that I remember.
Assistant District Attorney:	Did you have anything to drink that day?
Appellant:	No, I didn't, no.

N.T., 6/17/11, at 58-59.

In addition, Appellant challenges a question by the Assistant District Attorney asking Appellant about his recollection of the accident and whether Appellant would agree that heavy alcohol consumption might cause memory loss. Appellant's counsel, however, promptly objected to the question, and the trial court sustained the objection. *Id*. at 68-70. Finally, Appellant challenges a remark by the Assistant District Attorney, during his closing arguments, that Appellant's blood alcohol level could not be determined following the accident. *Id*. at 107. Appellant claims that, taken together, the Commonwealth's comments regarding Appellant's consumption of alcohol was prejudicial to Appellant, and warrants a new trial.

Appellant first objects to the Commonwealth's question as to whether Appellant had consumed alcohol prior to the accident. N.T., 6/17/11, at 58-59. However, Appellant's counsel did not object to the question at trial and Appellant responded to the question, asserting that he had not consumed alcohol. It is well established that the failure to raise a contemporaneous objection to evidence at trial waives claim on appeal. Pa.R.A.P. 302(a); ***Commonwealth v. Henkel***, 938 A.2d 433, 435 (Pa. Super. 2007). "[T]rial judges must be given an opportunity to correct errors at the time they are made. A party may not remain silent and afterwards complain of matters which, if erroneous, the court would have corrected." ***Commonwealth v. Strunk***, 953 A.2d 577, 579-580 (Pa. Super. 2008). Because Appellant's counsel did not object to the Commonwealth's question as to whether

Appellant had been drinking, and Appellant proceeded to answer the question, Appellant's challenge to that question on appeal is waived.

Subsequently, in the course of cross-examining Appellant, the Commonwealth attempted to elicit from Appellant whether his inability to remember the details of the accident stemmed from alcohol use. As noted above, Appellant's counsel promptly objected, and the trial court sustained the objection. N.T., 6/17/11, at 68-70. Appellant's counsel did not ask for a curative instruction, and the Commonwealth proceeded to a different question. *Id*. Because Appellant's objection to the Commonwealth's question was sustained, and Appellant did not request any further remedy to cure any potential prejudice resulting from the Commonwealth's question, we again conclude that Appellant's issue is waived. ***See Strunk***, 953 A.2d at 579-580 ("Even where a defendant objects to specific conduct, the failure to request a remedy such as a mistrial or curative instruction is sufficient to constitute waiver"); ***Commonwealth v. Manley***, 985 A.2d 256, 267, n.8, (Pa. Super. 2009).

Finally, Appellant challenges a remark made by the prosecution during closing arguments about the inability of authorities to determine Appellant's blood alcohol level at the scene of the crime. Once again, we note that Appellant's counsel did not object either at the time the remark was made or after the prosecution had concluded its closing arguments. "The absence of a contemporaneous objection below constitutes a waiver of appellant's

current claim respecting the prosecutor's closing argument." ***Commonwealth v. Powell***, 956 A.2d 406, 423 (Pa. 2008). Because Appellant failed to raise a timely objection, his challenge to the prosecutorial remarks during closing are waived.

Even if Appellant had preserved his claims for appellate review, we find no merit to his contentions. The trial court explained:

> [D]uring cross examination, the Assistant District Attorney asked several questions whether [Appellant] had consumed any alcohol prior to the collision. As noted, each of these questions took place on cross examination after the Commonwealth had put on its case in chief. In his direct testimony, [Appellant] did not deny he was the driver of the other vehicle; did not dispute that the accident took place at about 7:00 p.m.; and the only adverse conditions was a light drizzle of rain. [Appellant's] testimony was that he recalled nothing from immediately preceding the accident to sometime after the accident. In response to [the Commonwealth's] question about alcohol use, [Appellant] denied any consumption. The law does not require a new trial based on every remark made during the trial. A new trial is required when the effect of the prosecution's remark is to prejudice the jury, joining in their minds a fixed opinion and hostility towards the defendant so that they could not weigh the evidence impartially and render a true verdict. ***Commonwealth v. Lilliock***, 740 A.2d 237 (Pa. Super. 1999). The question about alcohol had relevance given [Appellant's] statement about lack of recollection, and the charges of leaving the scene. Since [Appellant] denied alcohol use it is difficult to say it would have caused any opinion in the jury's mind. The [trial court] did instruct the jury in the charge that counsel's questions and argument were not evidence. … In the overall context of the trial none of the remarks reached the level which would require a mistrial or a new trial.

Trial Court Opinion, 2/6/12, at 3. Given the foregoing, we find Appellant's first issue to be without merit.

In his second issue, Appellant argues that the Commonwealth failed to present sufficient evidence to sustain Appellant's conviction for homicide by vehicle. Appellant's Brief at 9-11. Our standard of review with regard to this challenge is as follows:

> The standard we apply in reviewing the sufficiency of the evidence 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. Devine, 26 A.3d 1139, 1145 (Pa. Super. 2011).

Homicide by vehicle is defined as follows:

> Any person who ***recklessly or with gross negligence*** causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic except section 3802 (relating to driving under influence of alcohol or controlled substance) is guilty of homicide by vehicle, a felony of the third degree, when the violation is the cause of death.

75 Pa.C.S.A. § 3732(a) (emphasis added).

Appellant claims that the Commonwealth failed to demonstrate that he acted either with recklessness or gross negligence. Appellant's Brief at 9-11. Appellant argues that the Commonwealth's accident reconstruction expert could not state whether Appellant had acted with recklessness or gross negligence, and provided no other evidence that Appellant deviated from the standard of care to support a conviction for homicide by vehicle. *Id*. Accordingly, Appellant argues that the evidence was insufficient to support his conviction.

"The concept of gross negligence is encompassed within the concept of recklessness as set forth in Section 302(b)(3) of the Crimes Code." ***Commonwealth v. Matroni***, 923 A.2d 444, 448 (Pa. Super. 2007) (citations omitted). Section 302, which pertains to the "General requirements of culpability," provides:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

18 Pa.C.S.A. § 302(b)(3).

Here, the trial court explained:

> [T]he Commonwealth through their witnesses, proved that at 7:00 p.m. on July 3, 2008, a car operated by [Appellant] entered the westbound lane and collided with the victim's vehicle. The cars collided nearly head-on as was demonstrated by the photographs submitted by the Commonwealth. The time

> of the accident was established by several witnesses, one of whom appeared on the scene shortly after the collision. The witness, Spiker, testified that both [Appellant] and the victim were still in their cars and [Appellant] was behind the wheel in his vehicle. Route 31 is a two lane macadam highway, and the accident took place at the intersection with Route 96. Corporal David R. Roland, a reconstructionist for the Pennsylvania State Police with six years of experience, and stipulated by the parties to be an expert in the field of reconstruction, stated [that] he could not determine whether [Appellant] was traveling eastbound on Route 31, or was pulling out from Route 96 at the time of the collision. The Corporal was able to fix the point of impact in the westbound lane of Route 31. The Corporal was also able to state that the vehicles were both going at least 15 mile[s] per hour due to damage to the vehicles. The victim's family testified that the victim was on his way home from work. To reach his residence, the victim traveled West on Route 31. Dr. Kirsch testified that the cause of the victim's death was the injuries received in the collision. The witness, Spiker, also testified that after [Appellant] got out of his car, he ran up over a wooded hillside saying that he had to go to the bathroom and he did not return. Neither the trooper who arrived at the scene, nor the reconstructionist, were able to provide any explanation why [Appellant] drove into the westbound lane and nearly head-on into the decedent's vehicle.
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> The record supports a finding [that Appellant] acted in a reckless and grossly negligent matter.

Trial Court Opinion, 2/6/12, at 4-5.

Upon review of the record, we agree with the trial court that the evidence was sufficient to sustain Appellant's conviction of homicide by vehicle. Corporal Roland, the Commonwealth's reconstruction expert, testified unequivocally that the accident was caused by Appellant's vehicle travelling in the wrong lane of traffic and into the oncoming westbound lane, resulting in a near head-on collision. N.T., 9/16/11, at 130, 147. Corporal Roland testified that he found no evidence that Appellant in any way

attempted to avoid the crash. *Id*. at 128-129. Although there was testimony that the accident occurred in light rain, there was no indication that the weather conditions or any obstacle on the roadway contributed to the accident. We conclude that the evidence presented by the Commonwealth was sufficient for the jury to conclude that Appellant acted with recklessness or gross negligence. ***See Commonwealth v. Eichelberger***, 528 A.2d 230, 231-232 (Pa. Super. 1987) ("The law is uniformly clear … that driving a vehicle on the wrong side of the roadway is sufficient to permit an inference of criminal negligence"). We therefore find Appellant's second issue to be unavailing.

For the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judge Wecht files a Concurring/Dissenting Memorandum.