NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
KRISTIAAN BALAS,	:	
	:	
Appellant	:	No. 428 EDA 2013

Appeal from the Judgment of Sentence February 1, 2013
In the Court of Common Pleas of Chester County
Criminal Division No(s).: 2386-12

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

MEMORANDUM BY FITZGERALD, J.: **FILED SEPTEMBER 04, 2013**

Appellant, Kristiaan Balas, appeals from the judgment of sentence entered in the Chester County Court of Common Pleas. Appellant argues that the evidence was insufficient to sustain his convictions for driving under the influence of alcohol or controlled substance ("DUI")—general impairment and DUI—highest rate of alcohol.[1] We affirm Appellant's conviction for DUI—general impairment but vacate his conviction for DUI—highest rate of alcohol.

* Former Justice specially assigned to the Superior Court.

[1] 75 Pa.C.S. § 3802(a)(1), (c).

We state the facts as gleaned from the trial testimony. On June 18, 2012, at around 7:00 p.m., Spring City Police Officer Bryan Kane, while in his marked car, observed Appellant turn his vehicle onto a side street without using his turn signal. Appellant then backed onto a main traffic corridor, nearly colliding with Officer Kane's vehicle. Officer Kane executed a traffic stop and, upon approaching Appellant, noticed a strong odor of alcohol. When asked if he had been drinking, Appellant replied, "not enough," and pointed to a nearby tavern. Trial Ct. Op., 3/13/13, at 3. Appellant's speech was slurred, his eyes were bloodshot, and he was "unsteady." ***Id.***

According to Officer Kane's trial testimony, Appellant was argumentative and non-compliant. The officer requested Appellant perform a walking field sobriety test, but Appellant objected, stating that a disability prevented him from doing so. Appellant subsequently failed a finger-to-nose test. After taking Appellant to the hospital for a blood test, Appellant refused to undergo testing.

Appellant was charged with, *inter alia*, disorderly conduct,[2] DUI—general impairment and DUI—highest rate of alcohol. According to the information, count one encompassed both DUI—general impairment and

[2] 18 Pa.C.S. § 5503(a)(4). Appellant was also charged with two driving offenses: 75 Pa.C.S. §§ 3334(a) and 3702(a).

DUI—highest rate of alcohol.[3] Information, 1/12/12, at 1. A bench trial was held on December 17, 2012. Appellant testified that he consumed "1+ Triple Sec drink and a coke" prior to driving. Trial Ct. Op. at 4. He further testified that he was uncooperative with the officer because "he doesn't trust cops." ***Id.*** He denied attempting the finger-to-nose test, and he claimed he would have consented to a blood draw done by his physician. At the end of closing arguments, the Commonwealth expressed its intent to withdraw the charge for disorderly conduct. N.T., 12/17/12, at 98.[4]

On December 20, 2012, the trial court found Appellant guilty of, *inter alia*, DUI—general impairment and DUI—highest rate of alcohol. According to the verdict slip, Count One encompassed both DUI—general impairment and DUI—highest rate of alcohol. Verdict, 12/20/12, at 1.

On February 1, 2013, the trial court sentenced Appellant to, *inter alia*, seventy-two hours to six months' imprisonment.[5] The docket also indicates

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[3] Appellant does not argue non-compliance with Pa.R.Crim.P. 563(B) ("There shall be a separate count for each offense charged.").

[4] The Commonwealth stated, "There is a disorderly conduct on the information, which the Commonwealth concedes – I was actually going to withdraw that prior to starting." N.T. at 98.

[5] Because Appellant refused to take a blood test, the trial court was required to sentence him under 75 Pa.C.S. § 3804(c)(1), which prescribes the minimum penalties for convictions under 75 Pa.C.S. § 3802. Section 3804(c)(1) provides, "An individual who violates section 3802(a)(1) and refused testing of blood or breath or an individual who violates section 3802(c) or (d) shall be sentenced as follows . . . ." 75 Pa.C.S. § 3804(c)(1).

Appellant's charge/conviction under DUI—highest rate of alcohol was withdrawn that same day. Criminal Docket, 3/18/13, at 4. There is nothing in the record substantiating the docket entry. The Commonwealth also asserts in its brief that Appellant's DUI—highest rate of alcohol "charge" was withdrawn: "[T]his charge was withdrawn on February 1, 2013 and [is] thus no longer relevant on appeal." Commonwealth's Brief at 10. Despite this assertion, the Commonwealth contradictorily maintains that Appellant was convicted under DUI—highest rate of alcohol. ***Id.*** at 5.

On February 6, 2013, Appellant filed a timely notice of appeal. He subsequently filed a timely, court-ordered Pa.R.A.P. 1925(b) statement.

Appellant presents the following issue for our review:

> Whether there was insufficient evidence against Appellant to support the finding of guilt on the charges of Driving After Imbibing, specifically when there was insufficient evidence to show that Appellant was incapable of safe driving as there were no field sobriety tests administered, no chemical tests, and minimal observation of Appellant operating the motor vehicle.

Appellant's Brief at 4. Appellant argues that the evidence was insufficient to support his convictions under DUI—general impairment **and** DUI—highest rate of alcohol because he did not undergo any field sobriety tests or any chemical tests, and the arresting police office had limited observation of Appellant operating the vehicle. ***Id.*** at 19. He contends that the Commonwealth produced no evidence of his blood-alcohol content while he was driving. ***Id.*** We agree with the trial court that the evidence was

sufficient to sustain his conviction for DUI—general impairment, but find meritorious his challenge to his conviction for DUI—highest rate of alcohol.

Our standard of review regarding a sufficiency challenge is as follows:

> We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.
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> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Mobley, 14 A.3d 887, 889-90 (Pa. Super. 2011).

The applicable statute for driving under the influence of alcohol or a controlled substance provides 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). In order to be found guilty of DUI—general impairment, "the Commonwealth [must] prove the following elements: the

accused was driving, operating, or in actual physical control of the movement of a vehicle during the time when he or she was rendered incapable of safely doing so due to the consumption of alcohol." ***Commonwealth v. Segida***, 985 A.2d 871, 879 (Pa. 2009). Moreover, this Court has stated, "Evidence of erratic driving is not a necessary precursor to a finding of guilt under [DUI—general impairment]. The Commonwealth may prove that a person is incapable of safe driving through the failure of a field sobriety test." ***Mobley***, 14 A.3d at 890.

Additionally, 75 Pa.C.S. § 1547(e) provides that a defendant's refusal to submit to a blood alcohol content test may be used as evidence against the defendant:

> In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3802 or any other violation of this title arising out of the same action, the fact that the defendant refused to submit to chemical testing as required by subsection (a)[6] may be introduced in evidence along with other testimony concerning the circumstances of the refusal. No presumptions shall arise from this evidence but it may be considered along with other factors concerning the charge.

75 Pa.C.S. § 1547(e).

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[6] Our Supreme Court held "the chemical tests authorized by § 1547(a)(2) violate the Fourth Amendment of the United States Constitution and Article I, § 8 of the Pennsylvania Constitution." ***Commonwealth v. Kohl***, 615 A.2d 308, 309-10 (Pa. 1992). Section 1547(a)(1), however, authorizes chemical tests for violations of section 3802. Appellant was requested to undergo a blood alcohol test pursuant to section 1547(a)(1), and thus ***Kohl*** does not affect our disposition.

Furthermore, our Supreme Court has stated:

> 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. . . . 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.

Segida, 985 A.2d at 879.

In ***Segida***, a police officer received a call of a one-vehicle accident. ***Id.*** at 873. Upon arriving at the scene, the officer noticed a strong odor of alcohol emanating from the defendant. ***Id.*** The defendant admitted that he had been drinking that night and that he lost control of the vehicle. ***Id.*** The officer arrested the defendant after he performed poorly on field sobriety tests. ***Id.*** A subsequent blood test revealed that he had a blood alcohol content of 0.326%, over 4 times the legal limit. ***Id.***

The defendant was convicted under 75 Pa.C.S. § 3802(a)(1), but this Court reversed. ***Id.*** at 873-74. We reasoned that "because the Commonwealth had failed to establish any temporal connection between the

time of the accident and the time that the officer arrived at the scene, it had not been proven beyond a reasonable doubt that [the defendant] was incapable of safely driving **at the time he was driving**." ***Id.*** at 874 (emphasis added).

Our Supreme Court vacated the Superior Court order. ***Id.*** Although the Supreme Court agreed that the statute requires proof of the defendant's "inability to drive safely due to intoxication at the time he was driving," it reasoned that this Court improperly applied the statute. ***Id.*** at 878, 880. After noting the evidence of the defendant's accident, odor, poorly-performed sobriety tests, high blood-alcohol content, and his admission that he was drinking, the Court held the evidence was sufficient to sustain his conviction. ***Id.*** at 880. Although the officer "had not observed the accident and did not know exactly what time it had occurred, he opined that it was 'doubtful' that the accident had occurred two or three hours or even ten minutes prior to his arrival on the scene 'due to traffic on the road.'" ***Id.*** Accordingly, the evidence was sufficient to establish a "rational and reasonable temporal link between the drinking and driving . . . ." ***Id.*** at 878.

In ***Mobley***, a police officer executed a traffic stop of the defendant after observing him coast through a stop sign. ***Mobley***, 14 A.3d at 889. Upon approaching the vehicle, the officer detected the odor of alcohol. ***Id.*** The defendant's speech patterns were slow and he appeared disoriented.

Id. After the defendant failed to provide his driver's license, the officer requested he undergo field sobriety tests. ***Id.*** He failed all four tests, including a finger-to-nose test. ***Id.*** After his arrest, the defendant refused to submit to a blood alcohol content test, claiming a fear of needles. ***Id.***

The trial court held the defendant was guilty of two counts of DUI—general impairment. ***Id.*** On appeal, we affirmed, noting that the defendant "failed four separate field sobriety tests, smelled of alcohol, and proceeded to coast through a stop sign despite a police officer being in plain view." ***Id.*** at 890.

Instantly, the present facts are substantially similar to the facts in ***Mobley***. In both cases, the officers saw the drivers commit traffic violations, noticed an odor of alcohol, observed the drivers fail at least one field sobriety test, and were refused a blood alcohol test. ***See*** 75 Pa.C.S. § 1547(e); ***Mobley***, 14 A.3d at 889. Moreover, Appellant's contention that no field sobriety tests were administered is meritless because the trial court concluded otherwise. ***See*** Trial Ct. Op. at 3 ("He failed the finger to nose test"). Although evidence of blood alcohol content is admissible, it was not required to convict Appellant under section 3802(a)(1). ***See Segida***, 985 A.2d at 879.

Finally, Appellant's assertion that there was "a very limited observation of [him] operating the motor vehicle" is unavailing. Pursuant to ***Segida***, Officer Kane was not required to observe Appellant operate the vehicle, as

the officer in ***Segida*** did not observe the defendant drive at all. ***See id.*** Accordingly, viewing the evidence in the light most favorable to the Commonwealth, the evidence was sufficient to support Appellant's conviction for DUI—general impairment beyond a reasonable doubt. ***See Mobley***, 14 A.3d at 889.

The Commonwealth asserts that Appellant's charge for DUI—highest rate of alcohol was withdrawn after his conviction. Commonwealth's Brief at 10. The docket corroborates this withdrawal. We are unable to discern, however, any basis authorizing the Commonwealth to withdraw a charge after a conviction. Therefore, out of an abundance of caution, we presume that Appellant's conviction for DUI—highest rate of alcohol stands, and address Appellant's challenge to the sufficiency of the evidence in support of this conviction.

To be convicted of DUI—highest rate of alcohol, an individual's blood alcohol content must be "0.16% or higher within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle." 75 Pa.C.S. § 3802(c); ***see also Commonwealth v. Karns***, 50 A.3d 158, 165 (Pa. Super. 2012), *appeal denied,* 65 A.3d 413 (Pa. 2013). Here, there is no evidence of Appellant's blood alcohol content, so this conviction must be vacated. ***See*** 75 Pa.C.S. § 3802(c); ***Karns***, 50 A.3d at 161.

We affirm the conviction for DUI—general impairment, but vacate the conviction for DUI—highest rate of alcohol.

Judgment of sentence affirmed in part and vacated in part.

Judgment Entered.

Prothonotary

Date: 9/4/2013