NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. SCOTT WILLIAM MCCARDLE Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 506 MDA 2012

Appeal from the Judgment of Sentence November 21, 2011
In the Court of Common Pleas of Mifflin County
Criminal Division at No(s): CP-44-CR-0000008-2011

BEFORE: SHOGAN, J., MUNDY, J., and OTT, J.

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

Scott William McCardle appeals from the judgment of sentence imposed on November 21, 2011 by the Mifflin County Court of Common Pleas. At the conclusion of a one-day trial on November 16, 2011, a jury found McCardle guilty of driving under the influence ("DUI") (highest rate of alcohol, second offense), unauthorized use of a motor vehicle, and driving while operating privilege is suspended (DUI-related).[1] On appeal, he challenges the sufficiency of the evidence with respect to his convictions. Based on the following, we affirm.

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[1] 75 Pa.C.S. § 3802(c), 18 Pa.C.S. § 3928(a), and 75 Pa.C.S. § 1543(b)(1.1)(i), respectively.

On October 15, 2010, McCardle was involved in a one-car accident at the bottom of the East Charles Street exit of Route 322 in Lewistown, Pennsylvania. There were apparently no eyewitnesses to the incident. McCardle was arrested and charged with numerous offenses relating to the incident.

The evidence presented at trial revealed the following: Between 2:30 a.m. and 2:45 a.m., another driver, Christine Schuster, approached the accident and saw a man sitting in the driver's seat. The car was against the westbound guardrails, crossways in the travel lane. She asked him several questions but he did not respond. She then called 9-1-1 and while she spoke with the operator, the driver of the wrecked car got out and walked down the road. Schuster walked towards him and asked him if he was okay. She testified the man put his arm around her and said, "'Rebecca just take me home.'" N.T., 11/16/2011, at 29. She saw his left arm was bleeding and that he was stumbling and falling over. She also observed that his breath smelled like alcohol. They then walked back to the car and the man sat down in the driver's seat and waited for the ambulance. Schuster testified that she did not see any other passengers or another person present but noticed that the driver's window was broken and there was blood on the side of the door. She could not make an in-court identification of the driver at the trial.

Thomas Smith was the Mifflin County Regional police officer on patrol that morning. He received a radio dispatch regarding the accident and arrived on the scene at 2:50 a.m. Officer Smith testified Schuster pointed to the driver of the vehicle as he was being escorted back to the ambulance. Smith then made an in-court identification that the driver was McCardle. He stated that after determining that the emergency responders were caring for McCardle, he went to look at the vehicle and observed a lot of blood in the driver's area of the car. He then looked over the embankment to see if there was anyone else in the area but did not see anyone. Officer Smith went back to the ambulance and spoke with McCardle. The officer testified that when he asked McCardle what happened, McCardle made a statement he was not the driver and that the driver "got out, ran down over the bank, and got in a boat." ***Id.*** at 65-66. Officer Smith observed that McCardle had slurred speech, bloodshot eyes, and an odor of an intoxicating beverage coming from his person. He stated that he could not conduct any field sobriety tests due to the extent of McCardle's injuries. McCardle was then taken by ambulance to the hospital. Officer Smith followed and arrived at 3:08 a.m. as McCardle was being transferred from the ambulance stretcher to a hospital bed. The officer asked McCardle three times to sign a DL-26 form, which operated as a consent form for blood testing, to which McCardle responded, "'I'm done with you. You can leave now.'" ***Id.*** at 68. Officer

Smith also asked McCardle who the driver was and McCardle told the officer that he did not know.

Max D. Park, a registered nurse at the Lewistown Hospital who worked on the morning in question, stated McCardle was brought into the emergency room *via* an ambulance, "[r]eportedly a patient of a motor vehicle accident earlier that [morning]." ***Id.*** at 39. Park observed that McCardle was combative and refused IV access. He testified that McCardle's blood was taken at 3:43 a.m and he handed the sample to Amanda Berich, a registered nurse, for testing.

Berich also testified that she observed Park draw blood from McCardle and then she took the sample, put an identification sticker on the container, and transmitted it to the laboratory at 3:48 a.m.

The Commonwealth introduced the results for McCardle's blood test and evidence that McCardle was not authorized to drive the vehicle. Katrina Putt, the medical lab technician, testified that McCardle's blood alcohol content ("BAC") level was .232. Michael E. Christoff testified that McCardle is his ex-son-in-law and that Christoff owned the wrecked vehicle. Christoff stated the car was parked at McCardle's residence because Christoff was in the process of turning it over to his grandson, Ryan McCardle, as a gift. Christoff testified that for insurance purposes, only Elizabeth Martin, Ryan's girlfriend, was authorized to use the car. He stated he did not give McCardle permission to drive or operate the vehicle.

Lastly, McCardle took the stand and admitted that he had been drinking before the accident but that his son's friend, Dave Culver, was the driver. He testified that he did not remember much about the accident except seeing "steam coming from the hood" and "presume[d]" that he got out on the passenger side. ***Id.*** at 97, 106. McCardle said that Culver got out of the car and left. He did not remember having conversations with Schuster or Officer Smith. McCardle pointed to the scar on his left arm, which resulted from the accident.

When asked about Culver, McCardle indicated that his sons' friend had passed away in September 2011. McCardle testified that prior to the trial, he disclosed Culver's identity as the driver to his family and friends but did not tell the police or any other authority. On cross-examination, when asked why it took him so long to identify the driver, McCardle explained that he was not charged until three months after the accident and stated: "I didn't want to drag nobody else into it. I didn't know it was gonna go this far." ***Id.*** at 114.

The jury found McCardle guilty of DUI (highest rate of alcohol, second offense), unauthorized use of a motor vehicle, and driving while operating privilege is suspended (DUI-related). On November 21, 2011, the court sentenced McCardle to a term of one to five years' incarceration for the DUI offense, a consecutive term of six months to two years' imprisonment for the unauthorized use crime, and a consecutive term of 90 days' incarceration for

the driving under suspension offense. McCardle filed a post-sentence motion, which the court denied on February 10, 2012. This appeal followed.[2]

Our standard of review for sufficiency claims is well-settled:

> 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 [this] 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 trier 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. Walsh, 36 A.3d 613, 618-19 (Pa. Super. 2012).

In McCardle's first argument, he claims there was insufficient evidence to convict him of all three crimes because the evidence failed to prove beyond a reasonable doubt that he was driving, operating, or in actual

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[2] On March 13, 2012, the trial court ordered McCardle to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). McCardle filed a concise statement on April 4, 2012. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on April 26, 2012.

physical control of the vehicle. Specifically, he states that the Commonwealth failed to establish the time of the accident, the location of the ignition key, or that the vehicle was operable after the accident. McCardle contends his mere presence at the scene or in the driver's seat does not prove actual physical control of, or past operation of, the vehicle. Moreover, he states that his injuries were consistent with his testimony that he was a passenger and Culver was the operator.

Here, McCardle was convicted of DUI pursuant to Subsection 3802(c) of the Pennsylvania Motor Vehicle Code, which provides, as follows:

> **(c) Highest 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 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).

Unauthorized use of a motor vehicle is defined as follows: "A person is guilty of a misdemeanor of the second degree if he operates the automobile . . . without consent of the owner." 18 Pa.C.S. § 3928(a).

A person commits the crime of driving while operating privilege is suspended where:

> [a] person who has an amount of alcohol by weight in his blood that is equal to or greater than .02% at the time of testing . . . and who drives a motor vehicle on any highway or trafficway of this Commonwealth at a time when the person's operating privilege is suspended . . . shall, upon a first conviction, be guilty of a summary offense and shall be sentenced to pay a fine of

> $1,000 and to undergo imprisonment for a period of not less than 90 days.

75 Pa.C.S. § 1543(b)(1.1)(i).

In ***Commonwealth v. Toland***, 995 A.2d 1242 (Pa. Super. 2010), *appeal denied*, 29 A.3d 797 (Pa. 2010), a panel of this Court explained the element of "driv[ing], operat[ing] or be[ing] in actual physical control," as follows:

> "The term 'operate' requires evidence of actual physical control of either the machinery of the motor vehicle or the management of the vehicle's movement, but not evidence that the vehicle was in motion." ***Commonwealth v. Johnson***, 833 A.2d 260, 263 (Pa.Super. 2003). "Our precedent indicates that a combination of the following factors is required in determining whether a person had 'actual physical control' of an automobile: the motor running, the location of the vehicle, and additional evidence showing that the defendant had driven the vehicle." ***Commonwealth v. Woodruff***, 447 Pa.Super. 222, 668 A.2d 1158, 1161 (1995). A determination of actual physical control of a vehicle is based upon the totality of the circumstances. ***[Commonwealth v.] Williams***, [871 A.2d 254], 259 [(Pa.Super. 2005)]. "The Commonwealth can establish through wholly circumstantial evidence that a defendant was driving, operating or in actual physical control of a motor vehicle." ***Johnson, supra*** at 263.

Toland, ***supra***, 995 A.2d at 1246 (citation omitted). "In a majority of cases, the [] location of the vehicle, which supports an inference that it was driven, is a key factor in a finding of actual control." ***Commonwealth v. Brotherson***, 888 A.2d 901, 905 (Pa. Super. 2005), *appeal denied*, 899 A.2d 1121 (Pa. 2006). "Conversely, where the location of a car supported the inference that it was not driven, this Court rejected the inference of actual physical control." ***Id.***

Here, the trial court found the following:

> The Court believes the totality of the evidence and circumstances, along with the testimony presented at trial, was sufficient for the jury to find that [McCardle] was the operator of the vehicle.
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> Christine Schuster testified that between 2:30 and 2:45 a.m. on October 15, 2010, she saw the vehicle which was part of an accident that gave rise to the charges filed against [McCardle]. As she approached the vehicle, she saw one gentleman who was sitting in the driver's seat. Ms. Schuster noticed the driver's window was broken, there was blood on the side of the door and the man sitting in the car had blood on his left arm.
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> Although at trial Ms. Schuster could not remember with certainty whether [McCardle] was the man from the accident, the testimony of Registered Nurse, Max D. Park, confirmed [McCardle] was in fact the individual Ms. Schuster saw sitting in the driver's seat. Mr. Park testified that on October 15, 2010, he was the emergency room nurse who took care of [McCardle] after the accident when he arrived in the Lewistown Hospital Emergency Room following transport from the scene by Fame EMS ambulance. Notably, Mr. Park testified that along with other injuries, [McCardle] had an injury to his left arm.
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> Furthermore, [McCardle]'s assertion during trial that another man, Dave Culver, was driving on the night of the accident is not feasible. First, Mr. Culver is now deceased (from an unrelated accident), and thus cannot corroborate [McCardle]'s contention that he was the driver. Second, Ms. Schuster did not see another person present when she approached the vehicle and found [McCardle] sitting in the driver's seat. Third, [McCardle] told an officer at the time of the accident that "another person" was driving and this person had left the accident by jumping over a bank to get into a boat that was located in Kish Creek. Finally, [McCardle] was charged in December of 2010 as a result of the October accident, and although Mr. Culver passed away in September of 2011, neither of them disclosed the allegation that Mr. Culver was driving until [McCardle] asserted this at his trial on November 16, 2011. The Court submits that the jury is permitted to accept the testimony given by witnesses at trial either in whole, in part, or not all.

> Therefore, the Court believes that by considering the testimony given by Ms. Schuster, Mr. Park and [McCardle], the jury had enough evidence to conclude that [McCardle] was the operator of the vehicle when the accident occurred on October 15, 2010.

Trial Court Opinion, 4/26/2012, at 1-2 (record citations omitted).

We agree. Based on the totality of circumstances, the jury could reasonably infer McCardle "operated" or was in "actual physical control" of the car at the time of incident. He was involved in a one-car accident, in which the vehicle hit both guardrails of an exit ramp of a highway until it came to a rest against a guardrail. When Schuster came upon the accident, McCardle was in the driver's seat and there were no signs of another person in the area. McCardle was still bleeding from his left arm and exhibited signs of intoxication. When Officer Smith arrived, McCardle still displayed signs of intoxication. McCardle admitted that he had been drinking on the night in question. He also had a blood alcohol content of .232. The jury was free to reject McCardle's accounts, to the officer on the night of the accident and at trial, that the driver was either unknown or Culver. Therefore, we conclude there was sufficient evidence to establish that McCardle "operated" or had "actual physical control" of the car. Accordingly, his first argument fails.

With respect to McCardle's second argument, he claims there was insufficient evidence to convict him of DUI because the evidence failed to prove beyond a reasonable doubt that the blood test was taken within two hours of driving, as required by statute, and there was no evidence relating the test's results back to the time of driving. He states the jury could only

speculate that the accident occurred before 2:30 a.m. and the Commonwealth did not present any evidence, which demonstrated a reliable approximation of when McCardle last drove, operated, or was in actual physical control of the vehicle. Moreover, McCardle states this is not a weight claim because the BAC evidence was not competent due to the lack of an established time between driving or operation of the vehicle and the testing of his blood, which in turn made it impossible for the jury to properly evaluate the evidence.

As noted above, to convict McCardle of DUI under Subsection 3802(c), the Commonwealth must prove the following: (1) that he imbibed or consumed alcohol; (2) that he drove, operated, or was in physical control of the movement of the vehicle upon a highway; and (3) that within two hours after operating or controlling the vehicle, the alcohol concentration in his blood was .16% or above.

McCardle's argument is one of mixed evidentiary and sufficiency claims. At trial, McCardle did not challenge the admission of the blood test results with respect to the "two hour rule" or the presumptive reliability of the results. Moreover, with respect to the sufficiency of the evidence, we note the trial court's well-reasoned analysis:

> The Court believes the testimony presented by Katrina Putt, a Medical Lab Technician at the Lewistown Hospital, along with the circumstances surrounding this case, establish otherwise. Ms. Putt, the lab technician who tested [McCardle]'s blood on October 15, 2010, testified that his blood-alcohol level was .232, significantly over the legal limit. Since Christine Schuster

> testified that she came upon the accident scene between 2:30 and 2:45 in the morning, and Max Park testified that [McCardle]'s blood was drawn at 3:43 a.m., it is reasonable for the jury to conclude that [McCardle]'s blood-alcohol level was tested within two hours from driving.
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> The location of the accident further supports that [McCardle]'s blood was tested within two hours of driving because the accident occurred on one of the main exit/entrance ramps linking the Borough of Lewistown and U.S. Highway 322. It is therefore not reasonably likely that a significant amount of time elapsed from the time the accident occurred until the time Christine Schuster saw [McCardle]'s car between 2:30 and 2:45 a.m. It is reasonably unlikely [McCardle] would have been sitting at the location of the crash for over an hour without someone noticing the accident due to the fact that it is a well-traveled major roadway. Thus the circumstances surrounding this case gave the jury sufficient evidence to determine that [McCardle]'s blood-alcohol level was .232 within two hours of driving a vehicle.

Trial Court Opinion, ***supra***, at 3 (record citations omitted).

Keeping in mind our standard of review, we agree with the trial court. Based on the totality of the circumstances, the Commonwealth established McCardle's blood was taken well within two hours of being discovered where: (1) Schuster was the first person to observe that McCardle's car was involved in a one-car accident and was blocking the exit ramp of a highway between 2:30 a.m. and 2:45 a.m. and (2) the emergency room nurse, Park, testified that McCardle's blood was drawn at 3:43 a.m. Therefore, McCardle's second argument fails as well. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.