NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. SHARON LEE NURY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 610 WDA 2011

Appeal from the Judgment of Sentence of March 18, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0006445-2010

BEFORE: MUSMANNO, J., BOWES, J., and WECHT, J.

MEMORANDUM BY WECHT, J. Filed: January 2, 2013

Sharon Lee Nury ["Appellant"] appeals from a March 18, 2011 judgment of sentence. Appellant was charged with and convicted of two counts of driving under the influence (general impairment and refusal to submit to testing), 75 Pa.C.S.A. § 3802(a)(1), and disorderly conduct, 18 Pa.C.S.A. § 5503(a)(1). We affirm.

The trial court provided the following factual and procedural history:

> [Appellant's counsel], on the day of trial, presented an Omnibus Pre-Trial Motion stating that Springdale Township Officer Patrick Ford did not have an articulable reason to investigate [Appellant]'s vehicle. To rebut [Appellant]'s assertions, the Commonwealth presented testimony from Officer Ford. [Appellant] presented no evidence.
>
> Officer Ford testified that, on February 13, 2010, at approximately 1:00 a.m., he was at the Springdale Borough police station when he heard a police dispatch over the radio regarding a disabled vehicle on Butler Street in Springdale Borough. Officer Ford and two Springdale Borough officers went

in separate patrol vehicles to locate the disabled vehicle. As he proceeded along Butler-Logan Road, a two-lane road in a residential area of Springdale Township, Officer Ford observed a white-colored vehicle, protruding out onto the road from a private driveway. Officer Ford described that approximately one-quarter of the vehicle, from the front tires forward, was in the driveway, while the rest of the car was in the street. The front end of the vehicle was in the driveway and the back end was on the roadway. Officer Ford testified that the vehicle was completely blocking one lane of traffic on Butler-Logan Road.

The driveway that the car was pulling in to was the driveway for the house belonging to [Appellant]. The driveway was completely snow-covered with approximately two (2) feet of snow. Officer Ford acknowledged that there had been a large snowfall in the days prior to February 13, 2010. [Appellant]'s driveway had not been plowed, and the snow was still fresh. There were no ruts in the snow in the driveway.

Officer Ford turned on his hazard lights and approached the vehicle. He observed the tires spinning as [Appellant] attempted to back out of the driveway. He knocked on the driver's side window to speak to [Appellant], and [Appellant] responded by putting the rear window down. [Appellant] then opened the door and said, "I know I shouldn't be driving at all", laughed and shut the door. She put the car in gear again and attempted to back out of the driveway. Officer Ford opened the car door, reached in to put the car in park, and took the keys out of the ignition. During his contact with [Appellant], Officer Ford smelled an odor of alcohol coming from [Appellant]. Officer Ford eventually discovered that the person who called about the disabled vehicle was, in fact, [Appellant] herself.

During the suppression hearing, [Appellant] argued that any evidence obtained after Officer Ford approached the car should be suppressed because Officer Ford did not have reasonable grounds to believe that a traffic violation or other crime had occurred. She also argued that there was no evidence presented to show that she had driven her car. The Commonwealth argued that Officer Ford approached [Appellant]'s car, in part, because she had been the one to call 911 in the first place. He also approached the vehicle because it was blocking a lane of travel and was a traffic hazard. He was attempting to assist a clearly disabled motorist and was justified in approaching [Appellant]'s vehicle. As to the evidence of driving or actual physical control,

there was direct evidence from Officer Ford that [Appellant] was placing the car in and out of gear, as well as circumstantial evidence that [Appellant] drove on the road to the point of pulling into her driveway. There was no argument presented on the issue of the constitutionality of [75 Pa.C.S.A.] §3802. This court denied [Appellant]'s motion, and the case proceeded to a non-jury trial.

During the trial, the parties stipulated that, based on his observations, Officer Ford had sufficient cause to take [Appellant] for chemical testing and that [Appellant] refused to submit to chemical testing. The parties also stipulated to the facts surrounding [Appellant]'s arrest. Officer Ford had [Appellant] step out of her vehicle, noticed that her speech was severely slurred and that she could not stand on her own, and observed that [Appellant] was very belligerent. [Appellant] was transported to Allegheny Valley Hospital, where she refused chemical testing. [Appellant] was very disruptive at the hospital and yelled at Officer Ford. When the officers attempted to transport [Appellant] back to the police station, hospital security had to assist the officers when they attempted to put [Appellant] in the police vehicle.

Following the Commonwealth's statement of the stipulated facts, [Appellant]'s attorney moved for a judgment for acquittal, on the same bases as his pre-trial motion, which was denied by this court. Again, there was no argument, or even mention, of the issue of the constitutionality of [75 Pa.C.S.A.] §3802.

After fully considering the evidence, this court found [Appellant] guilty of all charges. She was sentenced to ninety (90) days of Restrictive Intermediate Punishment, in the form of house arrest with electronic monitoring, with release for work, medical and educational purposes. [Appellant] also received an eighteen (18) month period of probation to run concurrent with her house arrest, as well as a $1500 fine. She was also required to attend alcohol highway safety school, undergo a drug and alcohol evaluation, and pay costs. There was no further penalty imposed at Count 2. For Count 3, [Appellant] received three months probation, to run consecutive to her probation at Count 1.

[Appellant] filed a Notice of Appeal on April 12, 2011, and presented this court with her Statement of Matters Complained of on Appeal on May 25, 2011.

Trial Court Opinion ["T.C.O"], 8/26/11, at 2-6 (citations to transcript omitted).

Appellant presents two issues for our review:

> Did the lower court err in failing to grant [Appellant]'s motion for judgment of acquittal at the conclusion of the Commonwealth's case-in-chief, in that:
>
> a. There was insufficient evidence that [Appellant] drove, operated, or was in actual physical control of the movement of a vehicle on a <u>highway or trafficway of the Commonwealth</u> as defined by Vehicle Code Section 102.
>
> b. Vehicle Code Section 3802(a)(1) is unconstitutional due to the vice of vagueness in that the clause "...or in actual physical control of the movement of a vehicle" is not capable of clear understanding, does not give proper notice of prohibited conduct and does not allow for a finding beyond a reasonable doubt, when applied to this case and others.

Appellant's Brief at 2.

Appellant's first issue challenges the sufficiency of the evidence presented relative to whether Appellant operated her car on a highway or trafficway of the Commonwealth. Our standard of review is as follows:

> As a general matter, our standard of review of sufficiency claims requires that we evaluate the record in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.
>
> Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Nevertheless, the Commonwealth need not establish guilt to a mathematical certainty, and may sustain its burden by means of wholly circumstantial evidence. Significantly, we may not substitute our judgment for that of the factfinder; if the record contains support for the convictions they may not be disturbed.

> So long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant's crimes beyond a reasonable doubt, his convictions will be upheld. 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. DiPanfilo, 993 A.2d 1262, 1264 (Pa. Super. 2010) *appeal denied*, 40 A.3d 120 (Pa. 2012).

Appellant was convicted of driving under the influence, which is defined 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.A. § 3802(a)(1). Section 3101 of the Motor Vehicle Code applies the driving under the influence statute to the highways and trafficways of the Commonwealth. 75 Pa.C.S.A. § 3101(b). A highway is defined as:

> The entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel. The term includes a roadway open to the use of the public for vehicular travel on grounds of a college or university or public or private school or public or historical park.

75 Pa.C.S.A. § 102. A trafficway is "[t]he entire width between property lines or other boundary lines of every way or place of which any part is open to the public for purposes of vehicular travel as a matter of right or custom." ***Id.***

Appellant argues that she was in her driveway, which is not a highway or trafficway because it is not publicly maintained or open to the public. Instead, Appellant maintains that her driveway is private and section 3802 does not apply. Appellant's Brief at 7-8.

The Commonwealth contends that it presented sufficient evidence that Appellant operated her vehicle on a highway or trafficway. The Commonwealth highlights Officer Ford's testimony that Appellant's vehicle was mostly on Butler-Logan Road, while only the portion from the front tires forward was on the driveway. The Commonwealth notes that Officer Ford's testimony was uncontradicted. Appellee's Brief at 7-13.

The trial court found the evidence to be sufficient. The trial court determined that the evidence, including the location of the car and the undisturbed snow ahead of the car, showed that Appellant was turning from the road into her driveway. T.C.O. at 9. The trial court also credited Officer Ford's testimony that approximately three-fourths of the car was on the road when Appellant got stuck in the snow. T.C.O. at 10.

Our review of the record confirms the trial court's finding. Officer Ford testified that Appellant's car was blocking one lane of travel. Notes of Testimony ["N.T."], 3/18/11, at 10. The front tires were in the driveway and the rest was in the road. N.T. at 21. The front tires were wedged up on the snow in the driveway. There were no ruts, only fresh snow, in the driveway past the point at which Appellant's vehicle was stopped. N.T. at 29-30. Appellant offered no evidence to contradict this testimony. Therefore, this

evidence, when viewed in the light most favorable to the Commonwealth as the verdict winner, is sufficient to show that Appellant drove on a highway or trafficway.

Appellant's second challenge is to the constitutionality of section 3802(a)(1), arguing that part of the statute is unconstitutionally vague. We note that:

> [W]hen evaluating challenges to a statute – whether those challenges are based on vagueness, overbreadth, the Commonwealth's burden of proof, the right to defend, or any other considerations – we must also keep in mind that there is a strong presumption that legislation is constitutional. A party challenging legislation bears a heavy burden to prove otherwise. Accordingly, this Court will strike the statute in question only if Appellant convinces us that it clearly, palpably and plainly violates the federal or state constitutions.

Commonwealth v. Beshore, 916 A.2d 1128, 1133 (Pa. Super. 2007) (quoting ***Commonwealth v. Thur***, 906 A.2d 555, 560-61 (Pa. Super. 2006)).

In determining whether a statute is vague, we are mindful that:

> a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Due process requirements are satisfied if the statute provides reasonable standards by which a person may gauge their future conduct.

Id. at 1134 (quoting ***Commonwealth v. Barud***, 681 A.2d 162, 165 (Pa. 1996)) (internal citation omitted). However:

> the void for vagueness doctrine does not mean that statutes must detail criminal conduct with utter precision. Condemned to

> the use of words, we can never expect mathematical certainty from our language. Indeed, due process and the void for vagueness doctrine are not intended to elevate the "practical difficulties" of drafting legislation into a "constitutional dilemma." Rather, these doctrines are rooted in a "rough idea of fairness." As such, statutes may be general enough to embrace a range of human conduct as long as they speak fair warning about what behavior is unlawful. Such statutes do not run afoul of due process of law.

Thur, 960 A.2d at 560 (internal citations omitted).

Further:

> Our rules of statutory construction and interpretation provide that we are to attempt to ascertain the effect of the legislature. 1 Pa.C.S.A. § 1921. If the language leaves any doubt, we can consider, *inter alia,* the mischief to be remedied by the statute, and the object to be obtained. ***Id.*** We are to presume that the legislature did not intend a result that is absurd or unreasonable. ***Id.***, § 1922. Also, "courts are not required to give the words of a criminal statute their narrowest meaning or disregard the evident legislative intent of the statute." ***Barud***, *supra,* at 304, 681 A.2d at 165. Further, as appellant notes, the title and preamble of a statute may be considered in its construction. ***Id.***, § 1924.

Beshore, 916 A.2d at 1135.

Appellant's concise statement and statement of questions presented frame this issue as a challenge that the phrase "in actual physical control of the movement of a vehicle" is unconstitutionally vague. However, the bulk of Appellant's argument is that the statute does not require proof of a defendant's blood alcohol content at the time of driving, but only within two hours of driving. Appellant's Brief at 10-12. This particular argument was not raised in Appellant's pre-trial motion, at trial, or in her concise statement of errors complained of on appeal. Therefore, it has not been properly

preserved for appeal. Appellant then, in two paragraphs, argues that the terms "actual," "physical," and "control" are subject to many interpretations and are too vague to put a reasonable person on notice of what conduct is prohibited. This challenge was preserved in Appellant's pre-trial motion. Appellant's Brief at 12-13.

The one case that Appellant cites does not support her position that the phrase is vague. In that case, the defendant was found sleeping in a reclined position in a parked car with the engine and lights off. ***Banner v. Commonwealth, Dept. of Transp.***, 737 A.2d 1203, 1204 (Pa. 1999). The defendant refused chemical testing, and his driver's license was suspended. ***Id.*** at 1205. It was that suspension that was appealed. Our Supreme Court explained that the determination of "actual physical control" was based on a totality of the circumstances test with consideration of the location of the vehicle, whether the engine was running, and other evidence indicating whether the defendant was driving prior to the arrival of the police officer. ***Id.*** at 1207. The ***Banner*** Court found merely that the facts before it were distinguishable from the cases that found actual physical control. ***Id.*** at 1208. The Court did not indicate that it found the statutory language vague.

The burden is on Appellant to show that the statute is unconstitutional. That burden is heavy. Here, to suggest vagueness in language that has been in the driving under the influence statute for almost thirty years, we have only Appellant's assertion that the phrase is subject to various meanings and Appellant's misplaced reliance on ***Banner***. This does not

suffice to clear the high hurdle involved in overcoming our presumption that a statute is constitutional. The courts of this Commonwealth have been using the phrase "actual physical control" for over forty years[1] with no indication that the phrase is so vague as to suggest that an ordinary person would not understand what conduct is prohibited. Appellant has not met her burden here.

Judgment of sentence affirmed. Jurisdiction relinquished.

---

[1] The phrase "actual physical control" seems to originate from a case defining "operating" in a prior version of the driving under the influence statute (75 P.S. § 1037). ***Commonwealth v. Kallus***, 243 A.2d 483, 485 (Pa. Super. 1968). The phrase was included in the statute in a 1982 amendment. ***Commonwealth, Dept. of Transp. v. Farner***, 494 A.2d 513, 514, 515 (Pa. Cmwlth. 1985). The ***Farner*** court determined that the phrase meant "involving control of the movements of either the machinery of the motor vehicle or of the management of the movement of the vehicle itself, without a requirement that the entire vehicle be in motion." ***Farner***, 494 A.2d at 516. Since then, the test has evolved into a totality of the circumstances test. ***See Banner***, 737 A.2d at 1207; ***Commonwealth v. Saunders***, 691 A.2d 946, 949 (Pa. Super. 1997).