NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MARK ELDRIDGE Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 668 MDA 2012

Appeal from the Judgment of Sentence March 6, 2012
In the Court of Common Pleas of Tioga County
Criminal Division at No(s): CP-59-CR-0000295-2011

BEFORE: PANELLA, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY OTT, J. Filed: February 1, 2013

Mark Eldridge appeals from the judgment of sentence entered against him following his conviction by jury on charges of DUI General Impairment, second offense; DUI Highest Rate, second offense; Exceeding the Speed Limit; and Careless Driving.[1] He received an aggregate sentence of five years' supervision, the first 10 months of which were to be served incarcerated as a work release or community service inmate. He was also ordered to pay the statutory fines and fees. Eldridge raises three issues on appeal: (1) the trial court erred in denying his motion to suppress evidence, (2) the verdict was against the weight of the evidence, and (3) the trial

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* Retired Senior Judge assigned to the Superior Court.

[1] 75 Pa.C.S. §§ 3802(a)(1), 3802(c), 3362(a)(2), and 3714(a), respectively.

court erred in denying his motion to modify his sentence.[2] After a thorough review of the submissions by the parties, relevant law, and official record, we affirm.

The evidence produced at the suppression hearing and jury trial[3] shows that on April 30, 2011, at approximately 8:00 p.m., Pennsylvania State Police Corporal Kirby Young was on patrol in an unmarked car. N.T. Suppression Hearing, 12/5/11, at 1. As he travelled west on State Route 49, Lawrence Township, Tioga County, Pennsylvania, he saw a Harley Davidson motorcycle, operated by Eldridge with Eldridge's wife, Karen, riding as a passenger. ***Id***. at 2. As the motorcycle exited State Route 15 to enter SR 49, the motorcycle "bobbled" as if it were going to fall over. ***Id***. This action caught Corporal Young's attention. ***Id***. He followed the motorcycle and clocked it, using his certified speedometer, as travelling 65 miles per hour on two separate occasions.[4] ***Id***. at 2-3. In addition, he saw the

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[2] This matter was originally remanded pursuant to Pa.R.A.P. 1925(c)(3) to allow Eldridge to file his Pa.R.A.P. 1925(b) statement of matters complained of on appeal and for the trial court to author a Pa.R.A.P. 1925(a) opinion. Both the statement and opinion have been filed and the matter is now ripe for decision.

[3] Unless otherwise noted, all citations to notes of testimony are from the suppression hearing. Our review of the official record demonstrates all relevant testimony from the suppression hearing was presented at trial.

[4] At the suppression hearing, Corporal Young did not testify how long he clocked Eldridge. However, at trial he testified he clocked Eldridge over a half-mile distance on both occasions. ***See*** N.T. Trial, 1/31/12, at 15. The affidavit of probable cause, filed by Corporal Young, also states he timed
(Footnote Continued Next Page)

motorcycle weave within its lane of travel, cross the center line twice and the fog line twice. ***Id***. at 2-3. After he clocked the motorcycle's speed the second time, he activated his lights and siren. ***Id***. at 4. Eldridge did not immediately pull over, but travelled until they arrived at a nearby boat launch facility. ***Id***.

In speaking with Eldridge, Corporal Young smelled a strong odor of alcohol on Eldridge's breath. ***Id***. Because of that, Corporal Young ordered Eldridge to perform three field sobriety tests, the one leg stand, the walk and turn, and the horizontal gaze nystagmus test. ***Id***. Eldridge failed all three. ***Id***. He was taken to the Soldiers and Sailors Hospital in Wellsboro, Pennsylvania, where blood was drawn for determining blood alcohol content (BAC). ***Id***. at 5. This happened within the statutorily permitted period.[5] After the blood was drawn, Eldridge was read his ***Miranda***[6] rights and questioned. ***Id***. He told Corporal Young he and his wife had been at the Elm's Tavern in Wellsboro with some friends for approximately two hours just prior to being stopped and that he drank a couple of beers during that

(Footnote Continued) ––––––––––––––––––––––

Eldridge for a distance of .5 miles. ***See*** 75 Pa.C.S. § 3368(a), requiring police to time a car for .3 mile when using a speedometer to measure speed. No argument was made at the suppression hearing regarding the lack of testimony of the distance over which Corporal Young had clocked Eldridge.

[5] 75 Pa.C.S. § 3802(c) (BAC of .16% or higher within two hours of driving, operating, or being in actual physical control of the movement of a vehicle).

[6] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

time. ***Id***. He also told Corporal Young he had not eaten since breakfast. ***Id***.

Test results revealed Eldridge had BAC of .194%, which is approximately 2.5 times greater than the legal limit. ***Id***. at 6. After receiving the test results, Corporal Young filed charges against Eldridge. ***Id***.

At both the suppression hearing and trial, Eldridge testified he drank four beers. ***Id***. at 27. Karen Eldridge also testified at both the hearing and trial that she saw Eldridge drink three beers, but he could have had another when she went to the restroom. ***Id***. at 11. Both denied weaving within the lane or crossing either the center or the fog lines and claimed to have been travelling no more than 50 to 55 miles per hour. ***Id***. at 12, 28. They also testified the "bobble" described by Corporal Kirby was a result of Eldridge wearing new boots that had not been broken in. ***Id***. at 11, 28-29. They also testified any weaving that might have occurred was because of the windy conditions. ***Id***. at 13, 28. Karen testified she is the mother of two children and is also raising a nephew and would not jeopardize herself by riding on a motorcycle with anyone she believed was intoxicated. ***Id***. at 12.

Based upon the above evidence, the jury convicted Eldridge of the two DUI charges. The trial judge convicted him of the two summary traffic offenses. Eldridge filed two post-sentence motions, one to modify his sentence and the other to modify his bail. The motion to modify sentence was denied, but his bail was modified to $50,000 unsecured, which presumably allowed for his release, pending disposition of this appeal.

Eldridge's first claim is the trial court erred in denying his motion to suppress evidence. He argues Corporal Young did not possess a reasonable suspicion sufficient to make the traffic stop. Specifically, the "bobble" witnessed by Corporal Young was not evidence of any wrongdoing, therefore, Corporal Young was not allowed to follow him and make the investigatory stop. ***See*** Appellant's Brief at 17.

> Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. Where, as here, the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to our plenary review.

Commonwealth v. Farnan, 55 A.3d 113, 115 (Pa. Super. 2012).

We begin by noting that Eldridge has provided no authority for the assertion that Corporal Young needed a reasonable suspicion to follow Eldridge on State Route 49. Rather, the law requires the police to possess a reasonable suspicion to make the traffic stop. ***See*** 75 Pa.C.S. § 6308(b), ***Commonwealth v. Fulton***, 921 A.2d 1239 (Pa. Super. 2007). In its Pa.R.A.P. 1925(a) opinion, the trial court stated,

> Corporal K. Young of the Pennsylvania State Police testified that he observed the defendant, Eldridge, operating his motorcycle on April 30, 2011 and saw the motorcycle "bobble" as it pulled onto the highway from a stopped position. However, this initial observation was not the reasonable suspicion for the stop. Corporal Young testified that the grounds for the stop were that he clocked the motorcycle exceeding the posted speed limit on two occasions, as he followed the motorcycle, and that the motorcycle crossed over both the fog line and center line of the road. The combination of these facts, the speeding and crossing both the fog line and center line, gave the officer reasonable suspicion to make the stop. Upon making the stop, the officer then observed the usual indicia of intoxication leading to the defendant's arrest.

Trial Court Opinion, 1/2/2013, at 2.

The facts related by the trial court are supported by the record and they provide the required level of suspicion that Eldridge had violated the speeding and careless driving sections of the Motor Vehicle Code.[7] Therefore, we agree with the trial court that Corporal Young had sufficient cause to stop Eldridge. Eldridge is entitled to no relief on this issue.

Next, Eldridge claims the verdict was against the weight of the evidence. The basis of this claim is that Eldridge and his wife were more

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[7] Careless driving, 75 Pa.C.S. § 3714, requires a showing of operating a vehicle with a careless disregard of the safety of persons or property. Almost tipping over a motorcycle, with a passenger, along with weaving in the lane and crossing the fog and center lines, while speeding, provides a reasonable suspicion for a violation of careless driving. ***See Commonwealth v. Barkley***, 341 A.2d 192 (Pa. Super. 1975) (weaving four or five times across lanes on the turnpike sufficient probable cause to stop for reckless driving).

believable than Corporal Young was and they provided reasonable explanations countering all of the allegations against him.

As noted above, Eldridge filed two post-sentence motions in this matter, neither of which raised the claim the verdict was against the weight of the evidence. Our review of the notes of testimony also shows that Eldridge never orally presented the argument to the trial court.

> Regarding Appellant's weight of the evidence claim we note that Appellant did not make a motion raising a weight of the evidence claim before the trial court as the Pennsylvania Rules of Criminal Procedure require. ***See*** Pa.R.Crim.P. 607(A). The fact that Appellant included an issue challenging the verdict on weight of the evidence grounds in his 1925(b) statement and the trial court addressed Appellant's weight claim in its Pa.R.A.P. 1925(a) opinion did not preserve his weight of the evidence claim for appellate review in the absence of an earlier motion. Pa.R.Crim.P. 607(A); ***Steiner v. Markel***, 600 Pa. 515, 968 A.2d 1253, 1257 (2009) (holding that inclusion of an issue in a 1925(b) statement that has not been previously preserved does not entitle litigant to appellate review of the unpreserved claim); ***Mack***, 850 A.2d at 694 (holding weight claim waived by noncompliance with Pa.R.Crim.P. 607, even if the trial court addresses it on the merits); ***Commonwealth v. Burkett***, 830 A.2d 1034, 1037 (Pa. Super. 2003) (same). ***See also Commonwealth v. Little***, 879 A.2d 293, 300-301 (Pa. Super. 2005), *appeal denied,* 586 Pa. 724, 890 A.2d 1057 (2005); ***Commonwealth v. Washington***, 825 A.2d 1264, 1265 (Pa. Super. 2003). Appellant's failure to challenge the weight of the evidence before the trial court deprived that court of an opportunity to exercise discretion on the question of whether to grant a new trial. Because "appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence," ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 753 (2000), this Court has nothing to review on appeal. We thus hold that Appellant waived his weight of the evidence claim because it was not raised before the trial court as required by Pa.R.Crim.P. 607.

Commonwealth v. Sherwood, 982 A.2d 483, 494 (Pa. 2009).

Because Eldridge failed to raise the issue before the trial court, either orally or by written motion, we are required to find the issue waived.

Finally, Eldridge claims the trial court imposed a manifestly excessive sentence in that it failed to consider all relevant factors before issuing the sentence. This claim represents a challenge to the discretionary aspect of his sentence.

> A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute. Two requirements must be met before we will review this challenge on its merits. First, an appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. [FN8] Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. In order to establish a substantial question, the appellant must show actions by the trial court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.
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> FN8. ***See*** Pa.R.A.P. 2119(f).
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> ***Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa. Super. 2004) (internal citations omitted). Moreover, we note that when determining whether an appellant has set forth a substantial question "[o]ur inquiry must focus on the reasons for which the appeal is sought, in contrast to the *facts* underlying the appeal, which are necessary only to decide the appeal on the merits." ***Commonwealth v. Tirado***, 870 A.2d 362, 365 (Pa. Super. 2005) (emphasis in original), *quoting* ***Commonwealth v. Goggins***, 748 A.2d 721, 727 (Pa. Super. (en banc).

Commonwealth v. Bricker, 41 A.3d 872, 875-76 (Pa. Super. 2012).

Here, Eldridge has not filed the required Rule 2119(f) concise statement of reasons for allowance of appeal. However, because the Commonwealth has not objected, the issue has not been waived. ***See Commonwealth v. Brougher***, 978 A.2d 373, 375 (Pa. Super. 2009).

A claim that the trial court has not considered all of the relevant factors before issuing sentence raises a substantial question, allowing for our review. ***See Bricker***, 41 A.3d. at 876.

The standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. ***Commonwealth v. Johnson***, 967 A.2d 1001 (Pa. Super. 2009). "An abuse of discretion requires the trial court to have acted with manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." ***Commonwealth v. Crump***, 995 A.2d 1280, 1282 (Pa. Super. 2010).

Eldridge specifically claims the trial court failed to consider the fact that Eldridge's criminal past dealt only with alcohol and that his planned use of Harbor Counseling services would address his rehabilitative needs. However, our review of the notes of testimony of the sentencing hearing demonstrates that both of those issues were placed before the court by

defense counsel.[8] ***See*** N.T. Sentencing, 3/5/12, at 3. Moreover, the reasons given by the trial court at the time of sentencing demonstrate that the judge properly considered a variety of factors in determining Eldridge's sentence.

> THE COURT: Alright. Mr. Eldridge, the – of course, I presided at the time of the trial in this case so I'm familiar with all the facts and the testimony from that. I would note that although this is a second DUI conviction within ten years for sentencing purposes this is actually a fourth lifetime DUI conviction given the record that is listed in the presentence report. That would indicate to the Court an ongoing difficulty and pattern of drinking and driving over an extended period of time that for whatever reason you have not been able, or willing, to deal with. And there is a minimum mandatory sentence in this case but the Court is going to impose a sentence that would be within the standard range of the guidelines but that would actually exceed the mandated minimum sentence because the Court believe [sic] that there is a more serious problem than what you have been able, or willing to admit to or to deal with up to this time.
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> I would note that the BAC level was .19% which is extremely high to be operating a motor vehicle at all on a highway and jeopardizing yourself and, everyone else that would have been around you.

N.T. Sentencing Hearing, 3/5/12, at 3-4.[9]

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[8] ***See Commonwealth v. Shutzues***, 54 A.3d 86, 99 fn. 13 (Pa. Super. 2012) (sentencing judge presumed to have considered information contained in pre-sentence report). We believe that same presumption may apply where the information, whether presented written or orally, is demonstrably before the court.

[9] The record also reflects the trial judge had the benefit of and considered a presentence report.

Contrary to Eldridge's claim, the record demonstrates the trial judge considered the totality of the circumstances before fashioning an individualized sentence for Eldridge. We discern no abuse of discretion in the sentencing. Eldridge is entitled to no relief on this issue.

Judgment of sentence affirmed.