NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
DAVID RICHARD DITTMAN,	:	
	:	
Appellant	:	No. 832 WDA 2012

Appeal from the Judgment of Sentence April 25, 2012
In the Court of Common Pleas of McKean County
Criminal Division No(s).: CP-42-CR-0000326-2011

BEFORE: STEVENS, P.J., MUNDY, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: March 4, 2013

Appellant, David Richard Dittman, appeals from the judgment of sentence entered in the McKean County Court of Common Pleas following his convictions for driving under the influence of alcohol or controlled substance ("DUI"),[1] maximum speed limits,[2] and careless driving.[3] He challenges the sufficiency of the evidence for DUI.[4] We affirm.

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* Former Justice specially assigned to the Superior Court.

[1] 75 Pa.C.S. § 3802(a)(1).

[2] 75 Pa.C.S. § 3362(a)(3).

[3] 75 Pa.C.S. § 3714(a).

The trial court summarized the facts of this case as follows:

> . . . During the bench trial, Trooper David Andrasko testified that during routine county patrol, he and Trooper Andy Dalton were situated perpendicular to U.S. Route 219 near the City of Bradford monitoring the speed of traffic using radar detection. Trooper Andrasko testified that he heard and saw [Appellant's] vehicle approaching, and the radar detected the speed of [Appellant's] vehicle to be 75 miles per hour. The stretch of roadway upon which [Appellant] was detected had a posted speed limit of 40 miles per hour.
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> Trooper Andrasko testified that it was difficult for the police cruiser to overtake [Appellant] because of his high rate of travel. Once [Appellant] was stopped, he attempted to exit his vehicle. Trooper Andrasko directed that [Appellant] stay in his vehicle numerous times. Both Troopers directed the traffic stop, but Trooper Andrasko was the closest in proximity to [Appellant]. Trooper Andrasko stated that "[Appellant] exhibited bloodshot glassy eyes and a strong odor of alcohol beverage as well as admitting to me when I asked him about that odor that he had drank prior in the night." Subsequently, [Appellant] was requested to perform field sobriety tests, and he complied with the request.
>
> Trooper Andrasko testified that in performing the field sobriety test, [Appellant] failed to keep his balance during the walk and turn portion of the test; he missed heel to toe on both sets of nine; he further raised his arms to keep his balance; and while raising one leg at a time, he could not hold either leg above ground for more than a few seconds. [Appellant] failed to complete the entirety of the test, "during which time he told me [Trooper Andrasko] that he couldn't do the test whether he was sober or drunk." Finally, he intimated to the Troopers that he was the owner of a business and would appreciate their turning

[4] Appellant purported to appeal from the verdict of non-jury trial. However, "A direct appeal in a criminal proceeding lies from the judgment of sentence." ***Commonwealth v. Patterson***, 940 A.2d 493, 497 (Pa. Super. 2007). Accordingly, we have amended the caption.

> a blind eye to the traffic stop and letting him go. [Appellant] was then arrested for suspicion of driving under the influence.

Trial Ct. Op., 7/16/12, at 2-3 (citations to the record omitted). Trooper Andrasko testified that after Appellant was placed under arrest for suspicion of DUI he was transported to the Bradford Regional Medical Center to have his blood drawn. N.T., 3/29/12, at 15. The trooper testified that he received the results immediately. ***Id.*** at 17. Appellant's blood alcohol content was .125. ***Id.*** at 70. He then arrested Appellant for DUI. ***Id.*** at 18. The trooper testified that he read Appellant his ***Miranda***[5] rights and then asked him as series of questions. Trooper Andrasko testified as follows:

> I will refer to my report. Um—there are very specific questions I'm going to read them verbatim. Where are you coming from and this is actually—I actually had this form with me. Where are you coming from? A friend's house in Bradford. What time did you leave? He advised 10 minutes before he (sic) pulled me over. Where are you going or where were you going? He advised me he was going home. When did you eat last? Five p.m. What was it? Fish and baked potato. Have you consumed any alcoholic beverages? Yes. What type? He advised that he had Jack Daniels and Coke approximately seven to eight of them. When did he have his last drink? He said approximately 12:30 a.m.

Id. at 18-19.

Following a bench trial, Appellant was found guilty of DUI, maximum speed limits and careless driving. He was sentenced to six months' probation. This appeal followed. Appellant filed a timely court-ordered

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

Pa.R.A.P. 1925(b) statement of errors complained of on appeal and the trial court filed a responsive opinion.

Appellant raises the following issue for our review:

> 1. Whether [Appellant's] conviction for Driving Under the Influence of Alcohol was supported by sufficient evidence as a matter of law; specifically, whether there is sufficient evidence to establish that any perceived impairment or poor driving decisions were caused by the consumption of alcohol?

Appellant's Brief at 4. Appellant argues that there was insufficient evidence "to prove beyond a reasonable doubt that any perceived impairment of [Appellant's] driving was caused by the consumption of alcohol." ***Id.*** at 9.[6]

Appellant avers that the totality of the circumstances do not prove that he was incapable of safely driving his automobile. He claims that speeding is not inconsistent with sobriety. ***Id.*** at 10. The delay in producing his documents was due to his cluttered glove compartment. ***Id.*** His glassy eyes and odor of alcohol were merely indicative of the consumption of

[6] The only case cited by Appellant is ***Commonwealth v. Mobley***, 14 A.3d 887 (Pa. Super. 2011) for the proposition that "in order to be found guilty of DUI, general impairment, the individual's alcohol consumption must substantially impair his ability to safely operate a vehicle." Appellant's Brief at 9. Appellant does not provide any legal authority in support of his argument that the evidence is insufficient. ***See*** Pa.R.A.P. 2119(b). We remind counsel, "The brief must support the claims with pertinent discussion, . . . and with citations to legal authority. . . . [W]hen defects in a brief impede our ability to conduct meaningful appellate review, we may dismiss the appeal entirely or find certain issues to be waived." ***Commonwealth v. Kane***, 10 A.3d 327, 331 (Pa. Super. 2010), *appeal denied*, 29 A.3d 796 (Pa. 2011). However, because this defect does not impede our ability to conduct appellate review, we decline to find waiver. ***See id***.

alcohol, not the inability to safely operate his motor vehicle. ***Id.*** Appellant contends that the admission to drinking is not sufficient to support the conclusion of substantial impairment. ***Id.*** He avers that his performance on the field sobriety test was due to his weight, not consumption of alcohol. ***Id.*** at 11. We hold no relief is due.

Our standard of review for a sufficiency claim is well settled:

> When evaluating a sufficiency claim, our standard is whether, viewing all the evidence and reasonable inferences in the light most favorable to the Commonwealth, the factfinder reasonably could have determined that each element of the crime was established beyond a reasonable doubt. This Court considers all the evidence admitted, without regard to any claim that some of the evidence was wrongly allowed. We do not weigh the evidence or make credibility determinations. Moreover, any doubts concerning a defendant's guilt were to be resolved by the factfinder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from that evidence.

Commonwealth v. Kane, 10 A.3d 327, 332 (Pa. Super. 2010), *appeal denied*, 29 A.3d 796 (Pa. 2011).[7]

Under section 3802(a)(1):

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[7] In ***Kane***, this Court found that the appellant was not entitled to relief on his claim that the evidence was insufficient to support his convictions because he disregarded this Court's standard of review. This Court opined: "[The a]ppellant's arguments disregard our standard of review. They are not based on a view of the evidence and its reasonable inferences in the light most favorable to the Commonwealth; rather, they are, **at best**, based on a view of the evidence in a light most favorable to [the a]ppellant." ***Kane***, 10 A.3d at 332 (footnote omitted).

> [A]n 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).

> 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. Blood alcohol level is admissible in a subsection 3801(a)(1) case only insofar as it is relevant to and probative of the accused's ability to drive safely at the time he or she was driving. 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.

Commonwealth v. Segida, 985 A.2d 871, 879 (Pa. 2009).

The trial court found that Appellant was substantially impaired in that he was driving in excess of thirty-five miles per hour over the speed limit. Trial Ct. Op. at 3. "Appellant committed a gross traffic violation, and failed to complete the field sobriety test. There was a strong odor of alcohol

emanating from his breath and person, and he admitted to the Trooper that he had been drinking previously in the evening." ***Id.*** at 4.

In the light of this evidence, we agree with the trial court that the evidence was sufficient to show Appellant was operating his vehicle and had "imbibe[d] a sufficient amount of alcohol such that [he was] rendered incapable of safely driving" under section 3802(a)(1). ***See*** 75 Pa.C.S. § 3802(a)(1); ***Segida***, ***supra***; ***Kane supra***.

Judgment of sentence affirmed.