

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

RICHARD KOSLOWER

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 861 EDA 2013

Appeal from the Order Entered March 11, 2013
In the Court of Common Pleas of Monroe County
Criminal Division at No(s): CP-45-CR-0001077-2012

BEFORE: ALLEN, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.:

FILED NOVEMBER 25, 2013

The Commonwealth appeals¹ from the March 11, 2013 order granting, in part, the omnibus pre-trial motion for *habeas corpus* relief filed by Appellee, Richard Koslower, and dismissing the charge of driving under the influence of alcohol or control substance (DUI) – highest rate of alcohol.²

* Former Justice specially assigned to the Superior Court.

¹ Generally, jurisdiction of this Court is confined to appeals from final orders. 42 Pa.C.S.A. § 742. Pursuant to Pennsylvania Rule of Appellate Procedure 311, however, the Commonwealth is permitted to take an interlocutory appeal as of right from a pre-trial order where the Commonwealth certifies, as is the case here, that the order will “terminate or substantially handicap the prosecution.” Pa.R.A.P. 311(d). Accordingly, the Commonwealth’s appeal is properly before this Court.

² 75 Pa.C.S.A. § 3802(c).

After careful review, we reverse and remand for proceedings consistent with this memorandum.

The trial court summarized the relevant facts of this case as follows.

On November 15, 2011, sometime between 8:00 pm and 9:00 pm, [Appellee] was seated in his car in the Delaware Water Gap Welcome Center parking lot. It is unclear exactly what time the [Appellee] entered the parking lot. The Welcome Center's parking lot is in a relatively remote location and the nearest store at which a person could buy alcohol is fifteen minutes away. When [Appellee] entered the parking lot, he parked in front of a dumpster. He started watching a movie on an electronic device he had within his car.

That evening, Albert Gary was working for the Welcome Center as a security guard. Mr. Gary started work at 8:00 pm and patrolled the Welcome Center, but did not observe [Appellee]'s car at that time. At precisely 9:00 pm while on his second patrol, Mr. Gary spotted [Appellee]'s car parked in front of the dumpster, which was marked with no parking signs. [Appellee]'s car was running. Mr. Gary approached [Appellee] and asked if anything was wrong. [Appellee] said nothing was wrong, but he was in an argument with his girlfriend and had just dropped his daughter off. Mr. Gary saw two full-size bottles of liquor within the car; one was empty and the other was half empty. [Appellee] admitted to Mr. Gary that he had been drinking. However, Mr. Gary did not personally observe [Appellee] drinking.

Mr. Gary told [Appellee] he was going to call the State Police. In response, [Appellee] offered Mr. Gary \$50.00 to let him go. Mr. Gary declined; he stepped away from [Appellee]'s car and called the Pennsylvania State Police at 9:21 pm. Troopers Gregory Emiliani and Ronald Barrett arrived at about 9:30 pm.

Trooper Emiliani approached [Appellee] and smelled a strong odor of alcohol “emanating from the [Appellee]’s facial area as he spoke.” He also observed the bottles of liquor, one empty and the other half empty. The car was not running when the Trooper approached. [Appellee] related that he had an issue with his wife and so had come to the parking lot. [Appellee] admitted he had been drinking but did not say when.

The Trooper subjected [Appellee] to field sobriety tests. [Appellee] failed the field sobriety tests and was arrested. At Pocono Medical Center, a blood test established the [Appellee]’s blood alcohol content [(BAC)] was .18% as of 10:32 pm.

[Appellee] argues that the Commonwealth has failed to make out a *prima facie* case because there was no evidence of [Appellee]’s actual physical control of his vehicle while he was intoxicated.

Trial Court Opinion and Order, 3/11/13, at 2-3 (footnotes and citation to notes of testimony omitted).

Appellee was subsequently arrested and charged with DUI – general impairment, DUI – highest rate of alcohol, and parking where official signs prohibit³ on November 15, 2011. On March 9, 2012, Appellee waived a preliminary hearing, and on July 16, 2012 entered a plea of not guilty. Thereafter, on September 27, 2012, Appellee filed an omnibus pre-trial motion for *habeas corpus* relief. On December 14, 2012, the trial court held an evidentiary hearing on Appellee’s motion. Following said hearing, the

³ 75 Pa.C.S.A. §§ 3802, 3802(c), and 3353(a)(3(ii), respectively.

trial court granted, in part, Appellee's motion for *habeas corpus relief*, and dismissed the charge of DUI – highest rate of alcohol. **See** Trial Court Opinion and Order, 3/11/13. This timely appeal followed on March 18, 2013.⁴

On appeal, the Commonwealth raises the following issues for our review.

1. Whether the [t]rial [c]ourt erred by concluding that the Commonwealth failed to establish a *prima facie* case that [Appellee] drove, operated or was in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in [Appellee]'s blood was 0.16% or higher within two hours after the [Appellee] drove, operated or been in actual physical control of the movement of a vehicle?
2. Whether the [t]rial [c]ourt erred by dismissing Count One of the Criminal Information charging [Appellee] with violation of 75 Pa.C.S.A. § 3802 (c), Driving Under the Influence of Alcohol, Highest Rate of Alcohol?

Commonwealth's Brief at 4.⁵

⁴ On April 5, 2013, the Commonwealth filed a timely concise statement of errors complained on on appeal in accordance with Pa.R.A.P. 1925(b). In lieu of filing a formal Rule 1925(a) opinion, the trial court issued a Rule 1925(a) statement on April 12, 2013, indicating that it is incorporating the reasoning of its prior opinion dated March 11, 2013.

⁵ As the Commonwealth's issues are interrelated, we elect to address them concurrently.

Our standard of review when considering a challenge to the trial court's grant of *habeas corpus* relief is as follows.

In a pre-trial *habeas corpus* case, on appeal this Court is to determine whether a *prima facie* case was established. In that vein, we may reverse a decision to grant a petition for *habeas corpus* only when the trial court has committed a manifest abuse of discretion.

Commonwealth v. Hendricks, 927 A.2d 289, 290 (Pa. Super. 2007)

(citations omitted).

Although a [*habeas corpus*] hearing is similar to a preliminary hearing, in a [*habeas corpus*] proceeding the Commonwealth has the opportunity to present additional evidence to establish that the defendant has committed the elements of the offense charged.

A *prima facie* case consists of evidence, **read in the light most favorable to the Commonwealth**, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime. The Commonwealth need not prove the defendant's guilt beyond a reasonable doubt. Rather the Commonwealth must show sufficient probable cause that the defendant committed the offense, and the evidence should be such that if presented at trial, **and accepted as true**, the judge would be warranted in allowing the case to go to the jury. In determining the presence or absence of a *prima facie* case, inferences reasonably drawn from the evidence of record that would support a verdict of guilty are to be given effect, but suspicion and conjecture are not evidence and are unacceptable as such.

Id. at 291 (emphasis in original; internal citations and quotation marks omitted).

Instantly, the trial court dismissed the charge against Appellee for DUI – highest rate of alcohol, concluding “[t]he Commonwealth simply provided no evidence from which a jury could reasonably infer that [Appellee’s BAC] was greater than .16% *while he was driving.*” Trial Court Opinion and Order, 3/11/13, at 7 (emphasis in original). In support of this conclusion, the trial court reasoned “that [Appellee] was not observed driving at 8:32 pm or thereafter. ... [Appellee] could have been driving his car exclusively at or before 8:31 pm. He could have been immobile in his car, in the parking lot, as early as 8:01 pm.” **Id.** at 6-7.

Viewing the evidence in the light most favorable to the Commonwealth, we disagree. The following statute guides our review when considering whether the Commonwealth satisfied its burden.

§ 3802. Driving under influence of alcohol or controlled substance

...

(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.A. § 3802(c). In Pennsylvania, an eyewitness is not required to establish one was driving, operating, or in actual physical control of a motor vehicle, but rather, the Commonwealth may establish these facts by means of wholly circumstantial evidence. ***Commonwealth v. Johnson***, 833 A.2d 260, 263 (Pa. Super. 2003).

Herein, the testimony presented by the Commonwealth in the instant matter supports a reasonable inference that Appellee operated or, at the very least, was in actual physical control his vehicle after consuming a sufficient amount of alcohol to render him incapable of safe driving, and within two hours of having a BAC in excess of 0.16%. ***See Hendricks, supra***; 75 Pa.C.S.A. § 3802(c).

The term operate necessitates evidence of actual, physical control of either the machinery of the motor vehicle or the management of the vehicle's movement, but does **not** require evidence that the vehicle was in motion. ... 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. Young, 904 A.2d 947, 954 (Pa. Super. 2006) (internal quotation marks and citations omitted; emphasis added), *appeal denied*, 916 A.2d 633 (Pa. 2006)

Instantly, the Commonwealth presented the testimony of Albert Gary, the Public Safety Director at the Delaware Water Gap Welcome Center, who

stated that he observed Appellee's vehicle "parked directly in front of the dumpster blocking traffic" at approximately 9:00 p.m. on the evening in question, and that Appellee acknowledged he had consumed alcohol. N.T., 12/14/12, at 6.

Q. Now, when you first saw [Appellee] did you make any observations of his appearance?

A. I walked up to him and approached him and said sir, you are illegally parked in a roadway. You are blocking the dumpster areas. I was going to have him move and then I said wait until the State Police arrive. And the gentleman offered me \$50.00 to let him go. He asked me where the nearest ATM was. I told him no, thank you for the money and just standby.

Q. Did you observe anything about this presence or the vehicle?

A. Yes. He was watching a DVD with porn. And he had two bottles of, I guess, alcohol in the vehicle.

Q. In the vehicle. Did he tell you whether he had been drinking or not?

A. Yes. He said he had a drink.

Id. at 7-8.

Gary testified that when he made his rounds earlier in the evening sometime between 8:00 and 8:30 p.m., Appellee's vehicle was not parked in the lot. **Id.** at 9-10. The record further reflects that Gary gave a statement to Pennsylvania State Trooper Ronald William Barrett that Appellee's vehicle had been running at the time he approached it. **Id.** at 12-14, 27.

Additionally, Trooper Gregory Emiliani, a then seven-year veteran of the Pennsylvania State Police, testified that upon arriving at the scene at approximately 9:30 p.m., he observed that Appellee exhibited multiple signs of intoxication. **Id.** at 15-16. Specifically, Trooper Emiliani noted that Appellee “had some issues with balance and coordination as well as his speech[,]” and there was an odor of alcohol emanating from his breath. **Id.** Suspecting Appellee was DUI, Trooper Emiliani administered three standardized field sobriety tests, all of which Appellant failed. **Id.** at 17. Based on these observations and his experience, Trooper Emiliani opined that “[Appellee] had operated a motor vehicle while impaired to a degree which would render him incapable of safely operating it[,]” and transported him to the Pocono Medical Center for a blood draw. **Id.** A blood alcohol test completed approximately 10:30 p.m. indicated that Appellant had a BAC of 0.18%. **Id.** at 18-19.

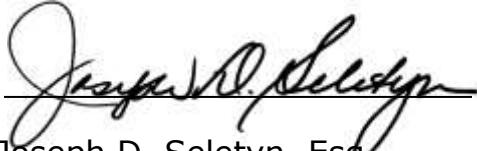
Furthermore, when the location of the vehicle supports an inference that it was driven, this inference will serve as a key factor in a finding of actual control. **Commonwealth v. Brotherson**, 888 A.2d 901, 905 (Pa. Super. 2005), *appeal denied*, 899 A.2d 1121 (Pa. 2006). In **Brotherson**, a panel of this Court determined that “[t]he highly inappropriate location of the car— on the basketball court of a gated children’s playground —created a strong inference that it was an already intoxicated [a]ppellant who had driven the car to that spot.” **Id.**

Likewise, in the case *sub judice*, the location of Appellee's vehicle also supports an inference that he drove to the Delaware Water Gap Welcome Center after purchasing and consuming the alcohol in question. As noted, Gary testified that he found Appellee's vehicle parked in front of the dumpster blocking the roadway to the truck lot. N.T., 12/14/12, at 6. Gary further noted that there was a bar "[a]bout 15 minutes down the road" from the Welcome Center that sold alcohol, but nothing in the immediate area. **Id.** at 9. Moreover, Trooper Barrett testified that although he did not attempt to determine if the motor of Appellee's vehicle had been "recently running" upon his arrival at the scene, said vehicle "was parked in an awkward manner ... facing two green dumpsters." **Id.** at 26-27. Trooper Emiliani echoed these sentiments, noting that Appellee's vehicle was parked in an "area exclusively for truck parking." **Id.** at 16. Additionally, Gary, Trooper Barrett, and Trooper Emiliani all observed two bottles of hard liquor inside Appellee's vehicle, one of which was completely empty and the other of which was half-full. **Id.** at 11, 22, 27.

Based on the foregoing, we conclude the trial court abused its discretion in finding that the Commonwealth failed to set forth a *prima facie* case for DUI - highest rate of alcohol. **Hendricks, supra** at 290-291. Accordingly, we reverse the March 11, 2013 order of the trial court granting, in part, Appellee's motion for *habeas corpus* relief, and remand so that said charge can be reinstated.

J-S61030-13

Order reversed. Case remanded. Jurisdiction relinquished.
Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath it.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/25/2013