NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
BRIAN KEITH VACULA,	:	
Appellant	:	No. 944 MDA 2012

Appeal from the Judgment of Sentence entered May 15, 2012 in the Court of Common Pleas of Cumberland County, Criminal Division, at No: CP-21-CR-0002125-2011.

BEFORE: MUNDY, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: Filed: January 3, 2013

Brian Keith Vacula (Appellant) appeals from the judgment of sentence entered May 15, 2012, following his convictions for two counts of driving under the influence – general impairment, and one count of failing to drive within a single lane.[1] We affirm.

The trial court summarized the relevant facts as follows:

> On May 13, 2011, [Appellant] was pulled over when Pennsylvania State Trooper Andryka witnessed him driving erratically on U.S. Route 11. When the Trooper approached the vehicle he smelled alcohol on [Appellant's] breath. [Appellant] admitted that he had been drinking. When asked to produce his license and registration he seemed confused. He had a hard time maintaining his balance once he got out if the vehicle. The Trooper noticed that [Appellant's] speech was "thickened and slurred" and that his eyes were bloodshot.
>
> Trooper Andryka has been employed by the Pennsylvania State Police for more than four years. In addition to his training

[1] 75 Pa.C.S. §§ 3802(a)(1) and 3309(1), respectively.

*Retired Senior Judge assigned to the Superior Court.

> in DUI interdictions he has participated in nearly 100 drunk driving stops. Based upon his training, experience and observations in the field, the Trooper concluded that [Appellant] was under the influence of alcohol to a degree which rendered him incapable of safe driving. [Appellant] was taken into custody and transported to Carlisle Regional Medical Center for a legal blood draw. After being given the DL-26 warnings, [Appellant] refused to be tested.

Trial Court Opinion, 8/7/2012, at 1-2 (footnotes omitted).

After a bench trial on March 27, 2012, Appellant was found guilty of two counts of driving under the influence - general impairment and one count of failing to drive within a single lane. On May 15, 2012, Appellant was sentenced to an aggregate term of 72 hours' to 6 months' imprisonment, plus fines and costs.[2] Appellant filed a timely notice of appeal. Both Appellant and the trial court complied with Pa.R.A.P. 1925.

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[2] We note that Appellant was convicted of one count of driving under the influence – general impairment, and a second count of driving under the influence – general impairment "with refusal." As this Court recently explained, the trial court erred by convicting Appellant of both counts:

> We write further . . . to address the fact that the trial court convicted Appellant of two separate counts of DUI—general impairment arising out of the same incident, with one count alleging Appellant refused the breath/blood test. The refusal of a blood alcohol content ("BAC") test is not a separate element under 75 Pa.C.S. § 3802; rather, those who refuse a BAC test must be charged pursuant to 75 Pa.C.S. § 3802(a)(1), general impairment. Since refusal of a breath/blood test is not an element of the criminal offense that pertains to guilt, the court should not have convicted Appellant of the same criminal offense, DUI—general impairment, arising out of the identical criminal episode. Instead, Appellant should have been convicted of one count of DUI—general impairment and been subject to the sentencing enhancement provided by statute relative to a blood or breath test refusal.

Appellant raises one issue for our review:

> Whether there was insufficient evidence to support [Appellant's] conviction[s] of Driving Under the Influence – General Impairment with Refusal and Driving Under the Influence – General Impairment because the Commonwealth failed to establish that [Appellant] had imbibed a quantity of alcohol that rendered him incapable of safely driving.

Appellant's Brief at 5.

Appellant does not challenge his conviction for failing to drive within a single lane, nor does he dispute the fact that he refused a blood draw after he was stopped by Trooper Andryka. Accordingly, we focus our analysis solely on whether sufficient evidence was produced to support Appellant's driving under the influence – general impairment convictions. Our well-settled standard of review is as follows:

> [O]ur 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. 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. Mobley, 14 A.3d 887, 891 (Pa. Super. 2011) (footnotes omitted). Although Appellant was convicted of a second count of driving under the influence – general impairment, the trial judge found that the two counts "merged for sentencing purposes," Trial Court Opinion, 8/7/2012, at 1 n.2. Thus, his sentence was not improper.

> The Commonwealth may sustain its burden by means of wholly circumstantial evidence. Accordingly, [t]he fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence. Significantly, we may not substitute our judgment for that of the fact finder; thus, 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, the appellant's convictions will be upheld.

Commonwealth v. Stays, 40 A.3d 160, 167 (Pa. Super. 2012) (internal quotations and citations omitted).

To convict an individual for DUI—general impairment under 75 Pa.C.S. § 3802(a)(1), the Commonwealth must prove the following elements beyond a reasonable doubt: "the accused was driving, operating, or in actual physical control of the movement of a vehicle during the time when he or she was rendered incapable of safely doing so due to the consumption of alcohol." ***Commonwealth v. Segida***, 985 A.2d 871, 879 (Pa. 2009).

> 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. . . . 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.

Id.

The trial court found that it "had no difficulty concluding that" the Commonwealth had met its burden of proof with regard to all charges. Trial Court Opinion, 8/7/2012, at 3. After a thorough review of the evidence presented at trial, we agree.

On appeal, Appellant argues that "the Commonwealth failed to prove beyond a reasonable doubt that [Appellant] had imbibed a sufficient amount of alcohol to render him incapable of safely driving." Appellant's Brief at 9. Appellant concedes that he had been drinking prior to being stopped by Trooper Andryka, but contends that his poor driving was caused by "fiddling with his mp3 player," that he was unable to perform field sobriety tests due to a "leg injury and disability," that he had difficulty producing his license and registration because "the stop occurred around 2:00 am and [Appellant] was not in his own car," and that Appellant's demeanor during the traffic stop was "not that of a man so intoxicated as to render him incapable of safely driving." ***Id.*** at 10.

However, Appellant's argument ignores our standard of review, ***supra***, which requires us to view the evidence **in the light most favorable to the Commonwealth**. At trial, Trooper Andryka testified that Appellant was driving erratically, as he crossed the white fog line four times and the double yellow lines twice. N.T., 3/27/2012, at 5. He testified that Appellant had difficulty producing his license and registration, relied on his vehicle for

balance, and could not complete the relevant field sobriety tests. ***Id.*** at 5-6, 11-12. Finally, Trooper Andryka confirmed that Appellant's speech was "thickened and slurred," that his eyes appeared "bloodshot and glassy," and that "the odor of alcohol [was] emanating from his breath." ***Id.*** at 14, 16. Thus, we hold that the trial court did not err in determining that sufficient evidence was produced at trial to support a finding of guilt.

Judgment of sentence affirmed.