NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
CHARLES L. NEIL,	:	
Appellant	:	No. 950 MDA 2012

Appeal from the Judgment of Sentence entered January 11, 2012
in the Court of Common Pleas of Franklin County,
Criminal Division, at No: CP-28-CR-00000701-2010

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

MEMORANDUM BY STRASSBURGER, J.: Filed: February 21, 2013

Charles L. Neil (Appellant) appeals from the judgment of sentence entered on January 11, 2011 following his convictions for driving under the influence of alcohol (DUI) - general impairment and DUI - highest rate of alcohol.[1] We affirm.

On June 24, 2009, a criminal complaint was filed against Appellant, charging him with two counts of DUI. The testimony elicited at trial established the following. On June 13, 2009, Trooper Ralph Hockenberry of the Pennsylvania State Police was dispatched to the Roxbury Ridge apartment complex in Southampton Township, Franklin County at approximately 8:00 p.m. to investigate reports of an erratic driver. It was raining that evening. Upon his arrival at the apartment complex, Trooper

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

*Retired Senior Judge assigned to the Superior Court.

Hockenberry noticed a white Buick double-parked across two marked parking spaces. The Buick was not running, although its lights were on and its windows were rolled down, despite the rain. Trooper Hockenberry approached the Buick and observed that the hood of the vehicle was still hot, indicating to him that it had been running recently.

Trooper Hockenberry then observed a white male, later identified as Appellant, banging on an exterior apartment door and yelling to a second-story window. The trooper approached Appellant and asked if the Buick was his. Appellant indicated that it was. Trooper Hockenberry then asked Appellant to come over to the vehicle with him. Appellant complied. The trooper noted that [Appellant's] clothing was disheveled and dirty, that he swayed and staggered when he walked, and his speech was impaired. Appellant also emitted a very strong odor of alcohol and his eyes were bloodshot and glassy.

Appellant told the trooper that he had driven to the apartment complex around noon and had been at the apartment all day. However, when asked who resided in the apartment, Appellant gave conflicting statements, first indicating that it was his uncle's apartment, then his friend's, then his brother-in-law's. Trooper Hockenberry asked Appellant for his driver's license. Appellant first produced a health insurance card. After a more diligent search of his wallet, Appellant gave the trooper his license.

Based on the above interaction, Trooper Hockenberry believed Appellant to be intoxicated. He asked Appellant to perform three field sobriety tests: the one-legged stand test, the walk-and-turn test, and the horizontal gaze nystagmus (HGN) test. Appellant was unable to perform the tests. As a result, he was placed under arrest and taken to Chambersburg Hospital, where it was determined that his blood alcohol content (BAC) was 0.251.

Appellant's preliminary hearing was scheduled for August 4, 2009. At some time prior to the scheduled hearing, Appellant decided to participate in an in-patient drug and alcohol rehabilitation program at White Deer Run. Appellant sent a handwritten notice to the magisterial district judge (MDJ) advising the court that he would be unable to attend his preliminary hearing. Appellant was discharged from White Deer Run on August 22, 2009. On March 11, 2010, the MDJ issued a "notice of continuance" rescheduling the August 4, 2009 hearing for April 6, 2010. There is nothing in the record to explain the 246-day delay.

At Appellant's preliminary hearing on April 6, 2010, all charges were bound for court following a hearing. Appellant's formal arraignment was scheduled for May 19, 2010. Appellant's next scheduled court date was the call of the criminal trial list on June 21, 2010. On that date, Appellant's case was listed for a pre-trial conference on July 1, 2010.

Appellant failed to appear in court on July 1, 2010 and a bench warrant was issued for his arrest. This warrant was lifted after Appellant voluntarily appeared on July 8, 2010. Appellant's case was scheduled for a plea on July 14, 2010. On July 15, 2010, Appellant requested a postponement to list his case for trial. Such request was granted and Appellant's case was scheduled for trial to commence on August 23, 2010. Following a series of postponements during the fall of 2010, Appellant's case was listed for the January 2011 trial term.

On December 6, 2010, Appellant filed a motion to dismiss prosecution pursuant to Pa.R.Crim.P. 600(C). In his motion, Appellant argued that the time from his arrest in June of 2009 until his preliminary hearing on April 6, 2011, was attributable to the Commonwealth. Thus, he claimed that the Commonwealth had failed to try his case within the 365-day timeframe as required by the Rule. On February 23, 2011, the trial court denied Appellant's motion. Appellant's case was scheduled for trial on May 9, 2011. Following multiple postponements by both the Commonwealth and Appellant, Appellant's case proceeded to a jury trial in December of 2011.

On December 8, 2011, Appellant was found guilty of both counts of DUI. On January 11, 2012, Appellant was sentenced to a term of incarceration of not less than 15 months nor more than 60 months. Appellant filed timely post-sentence motions, which were denied by the trial

court on April 24, 2012. This timely appeal followed. Both Appellant and the trial court complied with Pa.R.A.P. 1925.

Appellant raises three questions for our review.

> I. Whether the trial court abused its discretion in denying [Appellant's] motion to dismiss pursuant to Pa.R.Crim.P. 600 when the bulk of the time period at issue—229 days of delay—was caused by a failure of the magisterial district judge (MDJ) to reschedule [Appellant's] preliminary hearing after [Appellant] had notified the MDJ that he would be unable to attend the originally scheduled hearing on [August 4, 2009] because he was in an in-patient alcohol treatment program?
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> II. Whether the trial court erred in denying [Appellant's] post-sentence motion for judgment of acquittal by finding that the Commonwealth had established beyond a reasonable doubt each of the elements of the DUI tier III when the evidence did not establish that [Appellant] had driven, operated or been in actual physical control of the vehicle?
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> III. Whether the trial court erred in denying [Appellant's] post-sentence motion for a new trial by finding that the conviction was not against the weight of the evidence when the evidence did not establish that the vehicle had been driven by [Appellant] at a time when he was intoxicated?

Appellant's Brief at 6-7.

Appellant's first issue implicates the provisions of the so-called "speedy trial rule," Pa.R.Crim.P. 600.[2]

[2] Rule 600 sets forth the speedy trial requirements and provides in pertinent part:

> **Rule 600. Prompt Trial**
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> * * *

"In evaluating Rule 600 issues, our standard of review of a trial court's decision is whether the trial court abused its discretion." ***Commonwealth v. Hunt***, 858 A.2d 1234, 1238 (Pa. Super. 2004) (*en banc*). Further, we note:

> The proper scope of review…is limited to the evidence on the record of the Rule 600 evidentiary hearing, and the findings of the trial court. An appellate court must view the facts in the light most favorable to the prevailing party. Additionally, when considering the trial court's ruling, this Court is not permitted to ignore the dual purpose behind Rule 600. Rule 600 serves two

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> (A)(3) Trial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed.
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> * * *
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> (C) In determining the period for commencement of trial, there shall be excluded therefrom:
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> > (1) the period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his . . . whereabouts were unknown and could not be determined by due diligence;
> >
> > (2) any period of time for which the defendant expressly waives Rule 600;
> >
> > (3) such period of delay at any stage of the proceedings as results from:
> >
> > > (a) the unavailability of the defendant or the defendant's attorney;
> > >
> > > (b) any continuance granted at the request of the defendant or the defendant's attorney.

Pa.R.Crim.P. 600(A)(3), (C)(1)-(3).

> equally important functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society. In determining whether an accused's right to a speedy trial has been violated, consideration must be given to society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. However, the administrative mandate of Rule 600 was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth.
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> * * *
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> **So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Rule 600 must be construed in a manner consistent with society's right to punish and deter crime**.

Id. at 1238-39 (internal citations and quotation marks omitted) (emphasis added).

Although there were many continuances in this case, primarily at the trial level, the focus of this appeal is the lengthy delay of Appellant's preliminary hearing. As discussed above, the record in the instant case reflects that Appellant sent a letter[3] to the MDJ while at White Deer Run notifying the court that he would be unable to attend his preliminary hearing, which was first scheduled for August 4, 2009.[4] N.T., 1/31/2012, at

[3] Appellant was not represented by counsel at this time.

[4] Appellant maintains that he "did not request a continuance" in his letter, but merely indicted his unavailability for the scheduled court date. N.T., 1/31/2012, at 10-11. We note that, despite Appellant's protestations to the contrary, his letter to the MDJ constituted a *de facto* request to postpone his preliminary hearing. ***See*** *Comment* Pa.R.Crim.P. 543 (D)(2) ("If the issuing authority determines that there is good cause explaining why the defendant

9-10. The letter was not sent to the district attorney's office. ***Id*** at 13. The MDJ took no action on the letter until March 11, 2010, nearly seven months after Appellant's letter was received, when the MDJ issued a "notice of continuance" rescheduling the August 4, 2009 hearing for April 6, 2010. Such notice was provided to Appellant and the district attorney and Appellant's case was bound for court following the April 6, 2010 preliminary hearing.

Appellant contends that the delay from August 4, 2009 through April 6, 2010 is properly attributable to the Commonwealth because it failed to exercise due diligence in bringing his case before the court of common pleas. Appellant's Brief at 27. Following a Rule 600 hearing on this issue, the trial court determined that the MDJ bears full responsibility for the 246-day delay of Appellant's preliminary hearing. Accordingly, on appeal, the Commonwealth contends it "cannot lack due diligence where the delay was occasioned by another party and occurred without the knowledge or participation of the Commonwealth." Commonwealth's Brief at 7.

Our Supreme Court has previously addressed the issue of whether delays on the part of the MDJ can be imputed onto the Commonwealth for the purposes of Rule 600 in ***Commonwealth v. Monosky***, 511 A.2d 1376 (Pa. 1986) and ***Commonwealth v. Bradford***, 46 A.3d 693 (Pa. 2012).

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failed to appear [at his or her preliminary hearing], the preliminary hearing must be continued and rescheduled for a date certain.")

In ***Monosky***, the Supreme Court granted the Commonwealth's petition for an extension of the 180-day limitation under Pa.R.Crim.P. 1100 (recodified as Rule 600) where the MDJ misplaced paperwork and thus failed to forward the defendant's docket transcript to the Court of Common Pleas. Our Supreme Court held that the unexplained delay at the MDJ's office could not be used to penalize the Commonwealth where it had no knowledge of the delay and no control over it.

In ***Bradford***, the 365-day deadline under Rule 600 passed without the Commonwealth taking any action on the case following the preliminary hearing because the MDJ failed to forward the preliminary hearing record to the Court of Common Pleas, in accordance with Pa.R.Crim.P. 547(B).[5] ***Id.*** at 695. The trial court found that the district attorney's office did not exercise diligence in simply relying on the MDJ's office to comply with Rule 547. ***Id.***

[5] Rule 547, Return of Transcript and Original Papers, provides, in pertinent part,

> (A) When a defendant is held for court, the issuing authority shall prepare a transcript of the proceedings. The transcript shall contain all the information required by these rules to be recorded on the transcript. It shall be signed by the issuing authority, and have affixed to it the issuing authority's seal of office.
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> (B) The issuing authority shall transmit the transcript to the clerk of the proper court within 5 days after holding the defendant for court.

Pa.R.Crim.P. 547 (A), (B).

at 696-97. This Court affirmed in a divided opinion.[6] Our Supreme Court reversed, holding that the expiration of the Rule 600 deadline was not the result of the Commonwealth's failure to exercise due diligence, but was attributable to circumstances beyond the control of the Commonwealth, specifically, the MDJ's non-compliance with Rule 547(B). ***Id.*** at 702. Finding that the Rules of Criminal Procedure squarely place the burden of transmitting timely papers to the common pleas court upon the MDJ, the Supreme Court concluded that the district attorney did not act unreasonably in relying on the MDJ's compliance with the Rules as the triggering event for the district attorney's internal case tracking system. ***Id.*** at 704.

Instantly, despite having notice of Appellant's failure to appear for good cause in August of 2009, the MDJ failed to grant a continuance, or set a date and time for a new preliminary hearing, until March of 2010. Such non-action by the MDJ violated Rule 543(D)(2) and Rule 542(G) of the Rules of Criminal Procedure. Rule 543(D) requires the MDJ to continue a preliminary hearing in any case in which the defendant fails to appear: "If the issuing authority finds that there was good cause explaining the defendant's failure to appear, the issuing authority **shall** continue the preliminary hearing **to a specific date and time**, and **shall** give notice of the new date, time, and place[.]" Pa.R.Crim.P 543(D)(2) (emphasis added).

[6] ***Commonwealth v. Bradford***, 2 A.3d 628 (Pa. Super. 2010), *reversed*, 46 A.3d 693 (Pa. 2012).

Further, Rule 542(G), requires that notice of the new date and time for the preliminary hearing be given to the defendant, the defendant's attorney of record, if any, and the district attorney. In this case, the Commonwealth did not have notice that the postponement request was received or that it was granted. This deficiency rests squarely upon the shoulders of the MDJ and its obligation to evaluate and grant continuances at the preliminary hearing level. ***See Bradford,*** 46 A.3d at 704-705 (stating the MDJ's obligation to comply with Rules of Criminal Procedure is mandatory). Thus, we find no error in the trial court's determination that the 246-day delay was judicial delay beyond the scope of the Commonwealth's duty and attributable solely to the MDJ's noncompliance with the Rules of Criminal Procedure. Accordingly, we hold that the trial court properly denied Appellant's Rule 600 motion.

In his final two issues, Appellant claims that his conviction is not supported by sufficient evidence and is against the weight of the evidence presented.

> Our standard of review in assessing whether sufficient evidence was presented to sustain Appellant's conviction is well-settled. The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [this] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt

> may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Brumbaugh, 932 A.2d 108, 109-10 (Pa. Super. 2007) (citations omitted).

Appellant contends that the Commonwealth did not present sufficient evidence to show that he was operating or in actual physical control of vehicle. Appellant's Brief at 16. We disagree.

The trial court concluded

> [i]t is undisputed that [Appellant] drove the car at some point that day, that [the vehicle's] headlights were on [upon Trooper Hockenberry's arrival on scene] at 8:00 p.m., that his keys were in the ignition, that his windows were open despite the rain, that he had been in the vehicle to listen to the radio, and that [Appellant] was intoxicated. There was also other evidence which may or may not have been disputed but was, nonetheless, before the jury. Trooper Hockenberry [was dispatched to the scene for reports of an erratic driver, he] noted that the vehicle was irregularly parked, that the hood of the vehicle was still hot, and [Appellant] was outside an apartment trying to get the occupants['] attention to let him in despite his claim he had been there all day.
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> All of these factors that were presented to the jury establish sufficient circumstantial evidence to allow the jury to conclude that [Appellant] had recently driven or been in control of his vehicle while intoxicated. This is especially so when viewed in a light most favorable to the Commonwealth.

> Therefore, we deny [Appellant's] challenge to the sufficiency of the evidence.

Trial Court Opinion, 4/24/2012, at 4-5. We agree with the well-reasoned analysis of the trial court. Accordingly, we hold that when reviewed in the light most favorable to the Commonwealth, the evidence presented is sufficient to sustain Appellant's convictions.

We turn to Appellants challenge to the weight of the evidence. This Court's scope of review for a weight of the evidence claim is very narrow.

> The determination of whether to grant a new trial because the verdict is against the weight of the evidence rests within the discretion of the trial court, and we will not disturb that decision absent an abuse of discretion. Where issues of credibility and weight of the evidence are concerned, it is not the function of the appellate court to substitute its judgment based on a cold record for that of the trial court. The weight to be accorded conflicting evidence is exclusively for the fact finder, whose findings will not be disturbed on appeal if they are supported by the record.

Commonwealth v. Young, 692 A.2d 1112, 1114–1115 (Pa. Super. 1997) (citations omitted).

> It must be emphasized that it is not for this Court or any appellate court to view the evidence as if it was the jury. Our purview is extremely limited and is confined to whether the trial court abused its discretion in finding that the jury verdict did not shock its conscience.

Commonwealth v. Griffin, 684 A.2d 589, 597 (Pa. Super. 1996). Thus, appellate review of a weight claim consists of a review of the trial court's exercise of discretion, not a review of the underlying question of whether the

verdict is against the weight of the evidence. ***Commonwealth v. Widmer***, 744 A.2d 745, 753 (Pa. 2000).

Appellant claims that there is no direct evidence that he was in operation or control of the vehicle while intoxicated and that his own testimony that he only drove the vehicle earlier in the day contradicts that of Trooper Hockenberry. Appellant's Brief at 31.

The trial court determined that the verdict did not shock its conscience, stating that it also found the testimony of Trooper Hockenberry more credible than that of Appellant. Trial Court Opinion, 4/24/2012, at 6. Additionally, the trial court indicated that, although Appellant presented testimony that contradicted certain parts of the trooper's testimony, *i.e.* that he had only driven the vehicle earlier in the day, that the windows were down because they were broken, and that the hood of the vehicle was warm because he had been in it listening to the radio, such inconsistencies did not outweigh the evidence presented by the Commonwealth. ***Id.***

In light of the foregoing discussion and considering all the evidence adduced at trial, we are satisfied that the fact finder properly weighed the evidence and conclude, accordingly, that the trial court did not abuse its discretion.

Judgment of sentence affirmed.