

2010 PA Super 202

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
THOMAS A. LAMONDA,	:	
	:	
Appellant	:	No. 1972 MDA 2009

Appeal from the Judgment of Sentence Entered July 22, 2009
 In the Court of Common Pleas of Lancaster County
 Criminal Division at No. CP-36-CR-0001436-2008

BEFORE: BENDER, SHOGAN and CLELAND*, JJ.

*****Petition for Reargument Filed November 19, 2010*****

OPINION BY BENDER, J.:

Filed: November 8, 2010

Thomas A. Lamonda appeals the judgment of sentence imposed following his conviction of two counts of Homicide by Vehicle (HBV), and one count each of Driving Under the Influence of Alcohol or Controlled Substance, Driving on Roadways Laned for Traffic, Driving Vehicle at Safe Speed, and Unlawful Activities (Operating a Vehicle in Unsafe Condition); 75 Pa.C.S. §§ 3732(a), 3802(d)(1)(iii), 3309(1), 3361, 4107(b)(2) (respectively). Lamonda contends that the evidence was not legally sufficient to sustain his convictions of the latter three crimes as predicate offenses of HBV and that his aggregate sentence of 40 to 120 months' incarceration was manifestly excessive. He asserts further that the Court abused its discretion and violated his right to Equal Protection by imposing sentence for his HBV convictions based on his contemporaneous conviction

*Retired Senior Judge assigned to the Superior Court.

of DUI, as that conviction was itself based upon the presence in his bloodstream of an inert metabolite of cocaine. We conclude that because the evidence failed to demonstrate that the metabolic by-product in question had a causal relationship with Lamonda's HBV, imposition of sentence for HBV based upon the presence of the metabolite is not supported by a rational basis related to the purpose of the HBV statute. Accordingly, we vacate the judgment of sentence and remand for re-sentencing.

This prosecution followed the tragic deaths of victims Mary Hoover and Esther Hoover (the Hoovers) when the pick-up truck in which they were riding was struck head-on by a tractor-trailer rig driven by defendant Lamonda. The incident occurred on August 28, 2007, as the Hoovers were driving southbound on Route 272 (Oregon Pike) in Lancaster County and Lamonda's rig approached northbound in the oncoming lane traveling at 62 miles per hour in a 45 mile per hour zone. Although at least one vehicle was stopped in Lamonda's lane waiting to make a left turn across the southbound lanes of the roadway, Lamonda failed to slow the rig in adequate time to avoid a collision with the traffic in front of him. Only seconds before the ultimate impact, Lamonda braked hard and steered the rig to the left, crossing the double yellow dividing line directly into the path of the Hoovers' pick-up truck and striking the truck head-on. The Hoovers died upon impact from multiple traumatic injuries sustained in the collision.

During the course of the subsequent investigation, police interviewed eyewitness Joyce Herr who recounted that prior to the collision, she had stopped her vehicle in Lamonda's lane of travel to make a left turn at the intersection with Thomas Road. However, upon seeing Lamonda's tractor-trailer approaching in her rearview mirror, Herr concluded that the rig was moving at too high a rate of speed to avoid a collision, prompting her to abort the turn and drive ahead. Through her rearview mirror, she then saw the rig careen across the dividing line and hit the Hoovers' truck. Information recovered from a digital recorder onboard the tractor revealed that the rig had been traveling at 62 miles per hour for 1783 feet before Lamonda began to brake. Accident reconstruction indicated that had Lamonda applied the brakes initially, he could have brought the truck to a stop in 12 to 13 seconds. Lamonda did not react, however, until two to three seconds before impact when he was less than 100 feet from the Hoovers' truck. Consequently, the rig was moving at between 28 and 41 miles per hour at the moment of impact. Additionally, mechanical inspection of the rig, which weighed approximately 33,000 pounds, revealed several safety violations, some of which would have compelled removal of the vehicle from service had they been found.

Following the collision, Lamonda submitted voluntarily to a chemical blood test that revealed the presence in his bloodstream of benzoylecgonine, an inert byproduct of the metabolic breakdown of cocaine. It did not,

however, reveal the presence of cocaine itself. Accordingly, the Commonwealth charged Lamonda with HBV as follows:

COUNT 1 - HOMICIDE BY VEHICLE - 75 PA.C.S.A. 3732 - (FELONY 3)

The defendant did recklessly or with gross negligence cause the death of another person(s) while engaged in the violation of any law of the Commonwealth or municipal ordinance applying to the operation or use of a motor vehicle or to the regulation of traffic except section 3802 (relating to driving under the influence of alcohol or a controlled substance) where the violation was the cause of death; TO WIT: defendant did operate a 2007 International Tractor and 2002 Wabas Trailer northbound on Oregon Pike (SR272) and did recklessly swerve out of his northbound lane of travel into the opposing southbound lane of travel without first ascertaining whether the roadway was clear and disregarding the potential for approaching vehicles, striking a pick-up truck occupied by Mary M. Hoover and Esther M. Hoover after defendant failed to appropriately perceive and react to stopped traffic due to his sustained inattention. Mary M. Hoover died as a direct result of injuries sustained in the crash. Said offense occurred in Manheim Township, Lancaster County.

Criminal Information at 1.¹ The Commonwealth charged DUI as a separate offense under 75 Pa.C.S. § 3802(d)(1)(iii) based upon the presence in Lamonda's blood of the cocaine metabolite. The Commonwealth did not allege, however, that the presence of the metabolite was in any way related to the occurrence of the collision.

At trial, the Commonwealth introduced the testimony of the police officer who responded to the scene of the collision, the crash scene investigator who discovered the rig's mechanical problems, the accident

¹ Count Two of the Information charged HBV for the death of Esther Hoover and merely substituted the latter's name for that of Mary M. Hoover.

reconstruction specialist who applied the information from the rig's "black box," the forensic pathologist who autopsied the Hoovers' bodies, and eyewitness Joyce Herr. Lamonda testified on his own behalf and also called eyewitness Mercedes Perez, who testified that she had been traveling behind the rig at the time of the collision and saw smoke emanating from the truck and thought it had blown a tire. Following its deliberations, the jury found Lamonda guilty of the charges summarized, *supra*, and not guilty of the single count of Reckless Driving that the Commonwealth had also charged.

After ordering a pre-sentence investigation, the trial judge, the Honorable Howard F. Knisely, convened a sentencing hearing on July 22, 2009. At the hearing's conclusion, the court imposed the judgment of sentence at issue here, ordering consecutive terms of incarceration of 20 to 60 months on each count of HBV, and a concurrent sentence of 72 hours to six months' incarceration, a \$1000 fine, and a mandatory 12-month license suspension on the sole count of DUI. The court imposed nominal fines and costs for the remaining convictions thus rendering an aggregate prison sentence of 40 to 120 months. Lamonda filed a post sentence motion which the trial court denied.

Lamonda has now filed this appeal, raising the following questions for our consideration:

- I. Was the evidence presented at trial insufficient to prove beyond a reasonable doubt that Mr. Lamonda was guilty of two counts of Homicide by Vehicle where the

Commonwealth failed to provide sufficient evidence at trial to prove beyond a reasonable doubt that Mr. Lamonda was guilty of Driving on Roadways Laned for Traffic, Driving Vehicle at Safe Speed and/or Unlawful Activities[?]

- II. Did the Court violate Mr. Lamonda's rights to Equal Protection when it sentenced Mr. Lamonda with an Offense Gravity Score of 8 for the offenses of Homicide by Vehicle DUI-related when these were not charged as Homicide by Vehicle DUI-related charges and were simply Homicide by Vehicle with an Offense Gravity Score of 6 and where the cause of the homicide was not related to the commission of the Statutory DUI nor did it have an impact on the homicide[?]
- III. Did the Court abuse its discretion when it sentenced Mr. Lamonda with an Offense Gravity Score of 8 for the charges of Homicide by Vehicle DUI-related when these were not charged as Homicide by Vehicle DUI-related charges and were simply Homicide by Vehicle with an Offense Gravity Score of 6[?]
- IV. Was the trial court's aggregate sentence of 40 to 120 months['] incarceration manifestly excessive and unreasonable under the circumstances of this case, contrary to the fundamental norms underlying the sentencing process, not consistent with the protection of the public, the gravity of the offenses and the rehabilitative needs of Mr. Lamonda and therefore an abuse of discretion?

Brief for Appellant at 7-8.

Lamonda's first question impugns the sufficiency of the evidence to sustain his conviction of HBV by challenging the evidence adduced in support of the predicate offenses of Driving on Roadways Laned for Traffic, Driving Vehicle at Safe Speed and/or Unlawful Activities.

As a general matter, our 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.” ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 751 (Pa. 2000).

“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,” and may sustain its burden by means of wholly circumstantial evidence. Significantly, “[we] may not substitute [our] judgment for that of the factfinder; if the record contains support for the convictions they may not be disturbed.”

Commonwealth v. Brewer, 876 A.2d 1029, 1032 (Pa. Super. 2005) (citations omitted). 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.” ***Id.*** (quoting ***Commonwealth v. Murphy***, 795 A.2d 1025, 1038-39 (Pa. Super. 2002)). 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, his convictions will be upheld. ***See Brewer***, 876 A.2d at 1032. 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. ***See Commonwealth v. De Stefano***, 782 A.2d 574, 582 (Pa. Super. 2001).

Commonwealth v. Moran, ___ A.2d ___, 2010 PA Super 152 *3-4, 2010 WL 3211958, 3-4 (Pa. Super. 2010).

Lamonda’s challenge ultimately derives from his conviction of HBV, the statutory definition of which premises a conviction of that primary offense on the defendant’s commission of, *inter alia*, a violation of the Motor Vehicle

Code “applying to the operation or use of a vehicle or to the regulation of traffic[.]” The applicable section specifies, in pertinent part as follows:

§ 3732. Homicide by vehicle

(a) Offense.—Any person who recklessly or with gross negligence causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic except section 3802 (relating to driving under influence of alcohol or controlled substance) is guilty of homicide by vehicle, a felony of the third degree, when the violation is the cause of death.

75 Pa.C.S. § 3732(a).

Interpreting this provision, our Courts have recognized that “[i]n order for a person to be convicted of homicide by vehicle [he] must engage in a violation of the [Motor Vehicle] Code and such violation must be the cause of the death of another.” *Guidas v. Commonwealth, Dept. of Transp., Bureau of Driver Licensing*, 655 A.2d 228, 231 (Pa. Cmwlth. 1995). Additionally, the evidence must demonstrate the defendant’s culpability of at least gross negligence. *See* 75 Pa.C.S. § 3732(a). In this case, the jury found Lamonda guilty of Driving on Roadways Laned for Traffic, Driving Vehicle at Safe Speed, and Unlawful Activities, all of which may be treated as predicate offenses for a conviction of HBV. In the absence of sufficient evidence to sustain at least one of these convictions and evidence that Lamonda’s conduct was grossly negligent, the conviction of HBV may not itself be sustained. *See id.*

The first of these offenses, Driving on Roadways Laned for Traffic, is defined by the Motor Vehicle Code, in pertinent part, as follows:

§ 3309. Driving on roadways laned for traffic

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others not inconsistent therewith shall apply:

(1) Driving within single lane.—A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.

75 Pa.C.S. § 3309(1). Concerning this offense, Lamonda argues that the foregoing language requires the Commonwealth to prove “a *mens rea* of intentionally [sic]” which, in this case, was defeated by Lamonda’s own testimony that “he did not deliberately turn his vehicle into the oncoming lane” and the testimony of defense witness Mercedes Perez, who testified that she saw smoke emanating from the truck and thought that a tire had blown. Brief for Appellant at 28. Nevertheless, Lamonda offers no citation to establish the *mens rea* on which he relies; nor does he identify specific statutory language that might support such an interpretation. The statute merely prohibits a vehicle’s movement from a single lane “until the driver has first ascertained that the movement can be made with safety.” 75 Pa.C.S. § 3309(1). We find nothing in this language to establish that a driver must act intentionally in leaving his lane before he may be convicted of this offense; in point of fact, the “failure to ascertain” standard the statute creates is one of omission suggesting, at most, recklessness.

When considered in the proper context, the evidence adduced at trial is readily sufficient to establish that Lamonda moved from his lane of travel without first ascertaining “that the movement [could] be made with safety.” Sergeant Jeffrey Jones, who offered expert testimony as an accident reconstruction specialist, attested that Lamonda’s movement out of his lane was not the result of a skid and that the observed intrusion of the Hoovers’ pick-up truck into the left wheel well of the tractor could only have been achieved if the tractor’s wheel had been turned to the left at the time of the collision. N.T., 5/4/09-5/6/09, at 192-95. Sergeant Jones’s testimony established as well that the skid marks left by the rig prior to the collision originated in the northbound lane in which Lamonda was traveling, then curved toward and crossed the center line, entering the southbound lane and ending at the point of impact with the Hoovers’ pick-up truck. *Id.* at 197. Given the position of the pick-up truck in the southbound lane and Lamonda’s evident inability to bring his rig to a halt before the collision occurred, we must conclude, *a fortiori*, that Lamonda failed to ascertain that a lane change could be made with safety. Lamonda allowed circumstances of his own making, including the speed of the rig and inattention to traffic to enhance the possibility of a collision with vehicles in front of him, thereby compelling a deliberate turn into the oncoming lane of travel when he could not adequately slow his rig at the intersection of Thomas Road and Oregon Pike. Consequently, we find ample evidence to sustain Lamonda’s conviction

of Driving on Roadways Laned for Traffic as a predicate offense for Lamonda's conviction of HBV.

The foregoing analysis establishes the sufficiency of the evidence to sustain Lamonda's conviction of HBV and negates any need for us to consider the sufficiency of the evidence in that context to establish Driving Vehicle at Safe Speed or Unlawful Activities. Nevertheless, we find the evidence sufficient to establish those offenses as well. Driving Vehicle at Safe Speed is defined by the Motor Vehicle Code as follows:

§ 3361. Driving vehicle at safe speed

No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, nor at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around [a] curve, when approaching a hill crest, when traveling upon any narrow or winding roadway and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

75 Pa.C.S. § 3361. Interpreting this provision, we have recognized the intent of the legislature to penalize conduct based not merely upon a driver's speed of travel, but also upon prevailing conditions at the time of the collision:

Section 3361 has two sentences that must be read together. The first sentence sets forth two general and alternate types of conduct that, when a person is driving, constitute a violation: (1) at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards

then existing; or (2) at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead.

The second sentence of section 3361 begins with the phrase "*consistent with the foregoing*" and sets forth several specific examples of conditions and hazards that further define when the general conduct-unreasonable or imprudent speed-constitutes a violation. These situations include, but are not limited to, approaching a hill crest and approaching an intersection. These specifically enumerated situations are not the exclusive or sole situations that, together with inappropriate speed, might constitute violations, because there is a catchall category, *i.e.*, "when special hazards exist with respect to pedestrians *or* other traffic *or* by reason of weather or highway conditions."

There is no question that speeding alone does not constitute a violation of this section. There must be proof of speed that is unreasonable or imprudent under the circumstances (of which there must also be proof), which are the "conditions" and "actual and potential hazards then existing" of the roadway. These circumstances may include not only the amount of traffic, pedestrian travel and weather conditions, but also the nature of the roadway itself (e.g., whether four-lane, interstate, or rural; flat and wide, or narrow and winding over hilly terrain; smooth-surfaced, or full of potholes; clear, or under construction with abrupt lane shifts.) It is these circumstances under which one's speed may be found sufficiently unreasonable and imprudent to constitute a violation of section 3361, even if the driver has adhered to the posted speed limit.

Commonwealth v. Heberling, 678 A.2d 794, 795-96 (Pa. Super. 1996)
(footnote omitted).

In this instance, the evidence, in the form of a digital recorder onboard the tractor, established that within 30 seconds of the collision, Lamonda had driven his rig significantly over the speed limit, traveling at 62 miles per hour in a 45 mile per hour zone. N.T., 5/4/09-5/6/09, at 220-22. The same

evidence established that he began braking only *two seconds* prior to the collision, and Sergeant Jones testified that Lamonda was traveling at a speed too great to stop in the assured clear distance ahead. *Id.* at 225. Additionally, Joyce Herr testified that while she was stopped in Lamonda's lane of travel waiting to make a left turn onto Thomas Road, she saw Lamonda's rig approaching over a rise in the road at a sufficient speed that she was prompted to abandon the turn and drive forward in fear that the rig would collide with her car. *Id.* at 88-89, 94-95. Consequently, the evidence reveals that several of the very factors we have recognized to be indicative of the conduct proscribed by section 3361 were in fact present in this case. Lamonda was traveling at a high rate of speed over a rise in the road, bearing down on an intersection at which another vehicle was stopped waiting to make a left turn across the opposing lane. Considered together, as they occurred, the circumstances reveal that Lamonda was traveling "at a speed greater than [was] reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing." *See Heberling*, 678 A.2d at 795-96. Similarly, the occurrence of a fatal collision, resulting from Lamonda's failure to slow the rig as he approached the intersection establishes that he was traveling "at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead." *Id.* Accordingly, we find no hesitation in determining the

sufficiency of the evidence to sustain Lamonda's conviction of Driving Vehicle at Safe Speed as a predicate offense of HBV.²

Lamonda's second question goes to the crux of our determination to vacate the judgment of sentence and remand for re-sentencing.³ In that question, Lamonda challenges the judgment of sentence on grounds that

² The evidence is similarly sufficient to sustain Lamonda's conviction of Unlawful Activities pursuant to 75 Pa.C.S. § 4107(b)(2). The applicable section of that statute provides as follows:

§ 4107. Unlawful activities

(b) Other violations.--It is unlawful for any person to do any of the following:

(2) Operate, or cause or permit another person to operate, on any highway in this Commonwealth any vehicle or combination which is not equipped as required under this part or under department regulations or when the driver is in violation of department regulations or the vehicle or combination is otherwise in an unsafe condition or in violation of department regulations.

75 Pa.C.S. § 4107. Lamonda's conviction was based upon his failure to wear corrective lenses despite the condition on which his Medical Examiner's Certificate was issued allowing that he could be permitted to operate his rig only with corrective lenses. Although Lamonda concedes the condition on which his Certificate was issued, he contends that he was not required to wear correction for distance vision. To the extent that Lamonda's testimony in this regard contradicts the content of the certificate, it merely implicates the weight rather than the sufficiency of the evidence. Inasmuch as the condition upon which the Certificate was issued is not qualified as Lamonda contends and there is no dispute that Lamonda was not wearing corrective lenses at the time of the collision, the evidence is readily sufficient to sustain his conviction under 75 Pa.C.S. § 4107(b)(2).

³ Because we dispose of Lamonda's appeal in response to this question, we do not consider the arguments raised in support of his third and fourth questions.

imposition of an enhanced sentence for HBV with a DUI where the HBV was not DUI related violates the constitutional guarantee of Equal Protection of the laws. Brief for Appellant at 33. Lamonda argues that inasmuch as his DUI conviction was based on the presence of a metabolite of cocaine rather than cocaine itself, which caused no impairment, the homicides were not causally related to the DUI. Lamonda contends accordingly that enhancement of the sentence was devoid of any rational basis and therefore constitutionally infirm. Thus, Lamonda concludes that he should properly have been sentenced on the basis of the offense gravity score of 6 otherwise applied to HBV without DUI rather than the score of 8 actually used, which applies to HBV-DUI related.

“The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly.” *Commonwealth v. Bullock*, 868 A.2d 516, 524 (Pa. Super. 2005) (quoting *Curtis v. Kline*, 666 A.2d 265, 267 (Pa. 1995)). Judicial review of claims asserting a violation of Equal Protection depends upon both the constitutional status of the claimant whose rights are to be determined, *i.e.*, whether the claimant is a member of a suspect class, and classification of the right in question, *i.e.*, whether the right is “fundamental” or “important.” *See Commonwealth v. Hilliar*, 943 A.2d 984, 996 (Pa. Super. 2008). We have elaborated on the classification process as follows:

Equal protection analysis recognizes three types of governmental classification, each of which calls for a different standard of scrutiny. The appropriate standard of review is determined by examining the nature of the classification and the rights thereby affected.

In the first type of case, where the classification relates to who may exercise a fundamental right or is based on a suspect trait such as race or national origin, strict scrutiny is required. When strict scrutiny is employed, a classification will be invalid unless it is found to be necessary to the achievement of a compelling state interest.

The second type of case involves a classification which, although not suspect, is either sensitive or important but not fundamental. Such a classification must serve an important governmental interest and be substantially related to the achievement of that objective.

The third type of situation involves classifications which are neither suspect nor sensitive or rights which are neither fundamental nor important. Such classifications will be valid as long as they are rationally related to a legitimate governmental interest.

Id. (quoting *Commonwealth v. Beshore*, 916 A.2d [1128], 1133 [(Pa. Super. 2007)]). Thus, where the claimant is not a member of a suspect class and the right asserted is neither fundamental nor important “[t]he classification will . . . survive equal protection scrutiny so long as it is not arbitrary and rests upon some ground of difference having a fair and substantial relation to the object of the legislation” *Commonwealth v. Harley*, 924 A.2d 1273, 1281-1282 (Pa. Super. 2007).

In this instance, Lamonda acknowledges that this third “rational basis” test is the appropriate benchmark for our review. Lamonda contends,

however, that even given so relaxed a standard, the imposition of sentence here did not pass constitutional muster. The following excerpt is illustrative:

In the instant matter, through a series of stipulated facts, Mr. Lamonda was found guilty on Count 3 of the Information—Driving Under the Influence of Alcohol or Controlled Substance. 75 Pa.C.S.A. § 3802(d)(1)(iii). Specifically, evidence was presented that at the time Mr. Lamonda's blood was drawn, there was reported to be in his blood a detectible level of Benzoyllecgonine, a cocaine metabolite. This level was 300 nanog./ml. The summary of the report indicates that the examination of Mr. Lamonda's blood "gave no indications that the person was under the influence of detectible psychoactive substances, including alcohol, at the time the sample was obtained." Toxicology Report of Thomas Lamonda (Attachment 1 to Motion for Modification of Sentence). Nor is there any indication anywhere in the report that Mr. Lamonda was under the influence of detectible psychoactive substances, including alcohol, at the time of the accident.

To link this DUI, which is a strict liability DUI, without any requirement of impairment nor any relation to the automobile accident at all, to the sentence for Homicide by Vehicle [c]ounts, when these were not Homicide by Vehicle-DUI related (75 Pa.C.S.A. § 3735) charges is violative of Mr. Lamonda's right to Equal Protection. There is no rational reason for this DUI to impinge in any way on the sentencing of Counts 1 and 2 on this Information. If the Commonwealth had felt that Mr. Lamonda was truly impaired by anything during the course of this incident, there is no doubt whatsoever that Mr. Lamonda would have been charged with Homicide by Vehicle-DUI related.

The DUI in the instant matter was simply a strict liability DUI as Mr. Lamonda's blood showed the presence of a cocaine metabolite. The amount of the metabolite was in no way affecting Mr. Lamonda's ability to safely operate his motor vehicle and in no way contributed to the accident. To increase the Offense Gravity Score based solely on the fact that there was a detectible amount of cocaine metabolite but not an intoxicating amount of cocaine metabolite in Mr. Lamonda's blood has no rational relation to any legitimate government interest and is therefore a violation of Mr. Lamonda's right to Equal Protection.

Brief for Appellant at 36-37.

The record of evidence compiled at trial sustains Lamonda's assertion that the cocaine metabolite detected in his blood sample was not a cause of the HBV of which he was convicted; the forensic toxicology report which verified the presence of Benzoyllecgonine characterized it merely as "an inactive transformation product." *See* Forensic Toxicology Report, 9/7/07, at 2 (unnumbered) (Attachment 1 to Lamonda's Post Sentence Motion). In addition, the Commonwealth introduced no evidence whatsoever to establish that an "inactive transformation product" could have any effect on Lamonda's performance prior to the collision. Accordingly, the evidence does not establish a causal relationship between the presence of the metabolite in Lamonda's blood and the counts of HBV of which he was convicted.

Given the absence of the foregoing causal link, we can discern no basis for imposition of sentence on the same Offense Gravity Score imposed for a conviction of HBV-DUI related where, as must be the case, the HBV was caused by the defendant's intoxication. Nevertheless, that same Offense Gravity Score was applied by the trial court based upon 204 Pa. Code § 303.15, which draws no distinction between HBV-DUI related and HBV as charged here, where a DUI was also established but it had no relation to HBV. This distinction is critical for sentencing purposes, however, as

imposition of the same Offense Gravity Score effectively assumes and penalizes conduct by the defendant that was neither alleged nor proven, *i.e.*, that the presence of an inert metabolite played a causal role in the deaths of the victims of the HBV. We find such a sentencing scheme untenable as a clear deprivation of the equal protection of the laws to which every defendant is entitled.

As the evidence established here, Benzoylcegonone is an "inactive transformation product" with no demonstrated effect on Lamonda's performance and no causal relationship with the HBV he committed. Consequently, his offenses should properly have been scored as they were charged, *i.e.*, merely as HBV--without relation to DUI--thereby incurring an Offense Gravity Score of 6 and a correspondingly reduced sentence. **See** 204 Pa. Code § 303.15. Nevertheless, the trial court did treat Lamonda's strict liability DUI as a sentencing factor in assessing the penalty for his HBV convictions. The court stated its rationale, in part, as follows:

The presence of 300 nanograms per milliliter of a cocaine metabolite in [Lamonda's] system is still truly disturbing to the Court.

In fact there has been no explanation offered whatsoever as to why that was in his system.

N.T., Sentencing, 7/22/09, at 20. As discussed above, we find the presence of the metabolite in question legally irrelevant to Lamonda's sentence as he was not charged with HBV-DUI related and the Commonwealth introduced

no evidence to establish that the presence of the metabolite had any causal relation to the collision and the consequent HBV. The fact that an inert metabolite is present in a defendant's blood at the time of his commission of vehicular homicide does not render the offense more serious in the absence of a causal link between the metabolite and the homicide regardless of whether the metabolite's presence provides grounds for a separate DUI charge. Consequently, a court may not assume the higher Offense Gravity Score of 8 at sentencing, but is constrained to address the HBV offense with the standard Offense Gravity Score of 6. The court's reliance here on an Offense Gravity Score of 8 was not rationally related to the HBV offense of which Lamonda was convicted. Accordingly, the court's action did violate Lamonda's constitutional right to Equal Protection.

For the foregoing reasons, we vacate Lamonda's judgment of sentence and remand this matter for imposition of a new sentence consistent with this Opinion.

Judgment of sentence **VACATED**. Case **REMANDED** for re-sentencing. Jurisdiction **RELINQUISHED**.

Judge Shogan files a dissenting statement.

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BEFORE: BENDER, SHOGAN and CLELAND*, JJ.

DISSENTING STATEMENT BY SHOGAN, J.:

While I agree with the Majority’s analysis on most of the issues, I am constrained to respectfully dissent. Appellant does not directly challenge his DUI conviction. Thus, the issue upon which the Majority grants relief is whether a trial court can treat a strict liability DUI as a sentencing factor in assessing a penalty for a homicide by motor vehicle conviction without a causal connection between the DUI and homicide by motor vehicle. The fact that 204 Pa. Code § 303.15 provides for an offense gravity score of 8 for a conviction of homicide by motor vehicle with DUI, despite a gap in the causal link between the homicide by motor vehicle and DUI, is not, in my opinion, constitutionally infirm. Accordingly, I would affirm the judgment of sentence.

*Retired Senior Judge assigned to the Superior Court.