2013 PA Super 83

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
ROLAND A. SPOTTI, JR.	:	
Appellant	:	No. 677 WDA 2011

Appeal from the Judgment of Sentence Entered March 16, 2011
in the Court of Common Pleas of Allegheny County
Criminal Division, at No(s): CP-02-CR-0010771-2009

BEFORE: BENDER, DONOHUE, and STRASSBURGER,* JJ.

CONCURRING AND DISSENTING OPINION BY STRASSBURGER, J.:

Filed: April 12, 2013

I join the Majority Opinion in its cogent analysis of (A) the certification from Juvenile Court to Criminal Court and (B) Appellant's ***Brady*** claim.

However, because I disagree with the Majority's conclusion that Appellant's actions were not a direct cause of the victims' injuries such that he is guilty of aggravated assault while DUI (AA-DUI), I respectfully dissent as to the causation analysis.

The Majority concludes that Appellant's conduct was an indirect cause of victims' injuries, and thus, Appellant cannot be held criminally liable. In so doing, the Majority errs in rejecting the "chain of conduct" analysis set

* Retired Senior Judge assigned to the Superior Court.

forth in ***Commonwealth v. Nicotra***, 625 A.2d 1259, 1264 (Pa. Super. 1993).[1]

> The Crimes Code defines causation as
>
> (a) **General rule.**—Conduct is the cause of a result when:
>
> (1) it is an antecedent but for which the result in question would not have occurred; and
>
> (2) the relationship between the conduct and result satisfies any additional causal requirements imposed by this title or by the law defining the offense.

18 Pa.C.S. § 303(a). Additionally, in situation where, as here[2], negligently causing a particular result is an element of an offense, the Crimes Code provides that

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[1] ***Nicotra*** and its progeny make clear, "as long as the defendant's conduct started the chain of causation which led to the victim's injuries, criminal responsibility may properly be found." 625 A.2d at 1264.

[2] The crime of AA-DUI is defined as follows.

> Any person who **negligently** causes serious bodily injury to another person as the result of a violation of section 3802 (relating to driving under influence of alcohol or controlled substance) and who is convicted of violating section 3802 commits a felony of the second degree when the violation is the cause of the injury.

75 Pa.C.S. § 3735.1 (emphasis added).

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him,

> the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:
>
> > (1) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or
> >
> > (2) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a bearing on the liability of the actor or on the gravity of his offense.

18 Pa.C.S. § 303(c).

In ***Commonwealth v. Rementer***, 598 A.2d 1300, 1304 (Pa. Super. 1991), a panel of this Court set forth a two-pronged test to aid in our determination of whether a defendant's conduct is a direct and substantial cause of the victim's injuries. First, we must decide

> whether the defendant's conduct was an operative cause of the victim's [injury]. With respect to establishing a causal relationship between conduct and result, our crimes code poses **a threshold factual requirement and that is, the conduct must be an antecedent but for which the result in question would not have occurred**. Thus, if the victim's death is attributable *entirely* to other factors and not at all brought about by the defendant's conduct, no causal connection exists and no criminal liability for the result can attach.

> involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

18 Pa.C.S. § 302.

Rementer, 598 A.2d at 1305 (citations and footnotes omitted; emphasis added). "The second part of the test raises the question of whether the result of defendant's actions [was] so extraordinarily remote or attenuated that it would be unfair to hold the defendant criminally responsible." ***Id.; see also Commonwealth v. Nunn***, 947 A.2d 756, 760 (Pa. Super. 2008) (citations omitted)("[T]o establish criminal causation, the Commonwealth must prove that the defendant's conduct was so directly and substantially linked to the actual result as to give rise to the imposition of criminal liability.")

As evidenced above, and despite the Majority's conclusion, the "but-for" standard of causation is alive and well in the context of criminal law. As the comment to section 303 of the Crimes Code states, "[s]ubsection (a)(1) establishes the 'but-for' test of causation. Under existing [criminal] law causation is established if the actor **commits an act or sets off a chain of events from which in the common experience of mankind the result is natural or reasonably foreseeable**." Comment to 18 Pa.C.S. § 303 (emphasis added). Thus, section 303 allows a defendant's negligent conduct, direct or indirect, to form the basis for criminal liability where such a result is not so extraordinarily remote or attenuated that it would be unfair to hold the defendant criminally responsible. ***See Commonwealth v. Devine***, 26 A.3d 1139, 1148 (Pa. Super. 2011) *appeal denied*, 42 A.3d 1059 (Pa. 2012).

This Court's analysis in ***Commonwealth v. McCloskey***, 835 A.2d 801 (Pa. Super. 2003) should control. In ***McCloskey***, the defendant was convicted of three counts of involuntary manslaughter in the deaths of three teenagers who were involved in an automobile accident after leaving a keg party held in the defendant's home. On appeal, the defendant claimed that the Commonwealth failed to prove causation, arguing that "[the victim driver's] voluntary act of drinking to excess, his decision to drive, the fact that he was speeding when he lost control of his vehicle and all of the occupants' choices to refrain from wearing seatbelts were their own "tragic decisions," causing their deaths." ***Id.*** at 807. Applying the standards outlined in ***Rementer*** and ***Nicotra***, a panel of this Court rejected the defendant's argument, holding that the defendant's act of furnishing alcohol to minors, including the victim driver, "'started the chain of causation' that lead to the death of three teens." ***McCloskey***, 835 A.2d at 808. Thus, this Court determined that the defendant's negligent conduct was so directly and substantially linked to the actual result as to give rise to an imposition of criminal liability.[3] ***Id.***

[3] There is no support for the Majority's conclusion that the ***McCloskey*** decision is somehow an "exception to the general rule of criminal causation" because "the law imposes greater responsibility on adults who negligently or intentionally permit children to engage in high risk behavior." Majority Opinion at 23-25. There is absolutely no evidence that the Court in ***McCloskey*** held the defendant to a higher standard of criminal liability due to the underlying facts of the case.

Similarly, in the case at bar, although Appellant's conduct was not the most immediate cause of the victims' injuries, his conduct was directly and substantially linked to the resulting accident. Moreover, the resulting accident and injury were within the risk of harm which obviously existed when Appellant decided to drive intoxicated. ***See*** 18 Pa.C.S. § 303(c). Finally, there is nothing unfair about holding Appellant criminally responsible for the victims' injuries. ***See Rementer, supra.*** Accordingly, I would affirm the trial court's determination that the evidence was sufficient to prove causation.

Due to my disposition of Appellant's sufficiency question, I would also address Appellant's third claim on appeal: that the Commonwealth failed to prove beyond a reasonable doubt that the injuries to the Chungs constituted serious bodily injury.

Serious bodily injury is defined as "any bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ." 75 Pa.C.S. § 3735.1(b).[4] Instantly, Chung testified that the airbags in his vehicle deployed on impact, and he felt pain in his neck, chest, legs, and wrists immediately following the accident. N.T., 12/3-6/2010, at 118. He testified that he underwent physical therapy as a result of his neck and

[4] This subsection was subsequently deleted on October 19, 2010. ***See*** P.L. 557, No. 81, § 6, effective Dec. 20, 2010. However, the definition of "serious bodily injury was reenacted at 75 Pa.C.S. §102. ***Id.***

wrist injuries. ***Id.*** at 120. During his recovery, Chung developed a severe infection in his right arm and underwent surgery to remove bone and muscle matter. ***Id.*** at 123. As a result of his injuries, he is unable to fire a gun and is unable to pursue a career in law enforcement. ***Id.*** at 124.

Chung also testified as to his sister Susan's injuries.[5] Susan Chung experienced temporary chest pain and "some" loss of vision, loss of consciousness, and loss of hearing immediately following the accident.[6] ***Id.*** at 119, 125-126. Both Chung and his sister were treated and released the evening of the accident.

The trial court determined that serious bodily injury was inflicted upon both Steven and Susan Chung. I agree with the trial court's assessment regarding Steven Chung and, accordingly, would affirm Appellant's conviction in that regard.

However, the injuries befalling Susan Chung, while certainly rising to the level of bodily injury, were not of the serious nature contemplated under the statute and are easily contrasted with cases where this Court has upheld a finding that serious bodily injury has occurred. ***See Commonwealth v.***

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[5] Susan Chung resides in Michigan and was unable to attend trial under doctor's orders due to an unrelated medical issue. In addition to Chung's testimony, Susan Chung's medical records were admitted, without objection, as evidence of her injuries and treatment. N.T., 12/3-6/2010, at 125-127.

[6] All of Susan Chung's sensory losses were regained, although the record is unclear as to when this occurred. The medical records are not part of the certified record. However, the testimony indicates the effect was temporary and likely caused by the deployment of airbags in the Chung vehicle. N.T., 12/3-6/2010, at 119, 125-126

Nichols, 692 A.2d 181 (Pa. Super. 1997) (evidence was sufficient to support finding that victim suffered serious bodily injury, as required to support aggravated assault conviction, where victim's jaw was wired shut for six weeks during which he could only ingest through a straw); ***Commonwealth v. Cassidy***, 668 A.2d 1143 (Pa. Super. 1995) (evidence sufficient to support finding that victim suffered serious bodily injury where victim faded in and out of consciousness, necessitating a two-day hospitalization, and that victim had to wear a wrist cast and body brace for two months); ***Commonwealth v. Battaiato***, 619 A.2d 359 (Pa. Super. 1993) (abrogated on other grounds by ***Commonwealth v. Burke***, 781 A.2d 1136 (Pa. 2001)) (holding that evidence victim sustained a compound fracture of the left tibia, two torn ligaments, and a broken right tibia following automobile accident was sufficient to support finding of serious bodily injury); ***Commonwealth v. Caterino***, 678 A.2d 389 (Pa. Super 1996) (holding that the victim's broken nose and severed artery, which required over three hours of emergency surgery, constituted serious bodily injury).

Accordingly, I would vacate Appellant's conviction with respect to Susan Chung and remand for resentencing on the three remaining counts of AA-DUI.