

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
KURITS L. TOOTHMAN,	:	
	:	
Appellee	:	No. 743 WDA 2012

Appeal from the Order entered on April 11, 2012
in the Court of Common Pleas of McKean County,
Criminal Division, No. CP-42-CR-0000445-2011

BEFORE: MUSMANNO, WECHT and COLVILLE*, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: January 24, 2013

The Commonwealth of Pennsylvania appeals from the trial court Order granting Kurtis L. Toothman's ("Toothman") Motion for *habeas corpus* and dismissing a count of aggravated assault. **See** 18 Pa.C.S.A. § 2702(a)(1). We reverse and remand for further proceedings.

The trial court set forth the relevant underlying facts as follows:

On June 16, 2009, [Toothman] and friends were drinking beer, Molson bottles, near a reservoir in the area of West Corydon Street, Bradford Township, McKean County, Pennsylvania. [Toothman] and three passengers[, Erica Pascarella ("Pascarella"), Rebekah Combs ("Combs"), and Tyler Lucco ("Lucco"),] entered a parked vehicle and left to go to the City of Bradford to purchase more beer. [Toothman] was the driver. [Toothman] almost hit two other parked vehicles when pulling onto the roadway. [Toothman] then began drifting toward the edge of the roadway. A passenger[, Pascarella,] told him to "pay attention" and [Toothman] responded "we're fine." [Toothman] then began to go faster and two of the passengers told him to slow down. [Toothman] responded that he "wanted to hit this little jump." The passengers[, Pascarella and Combs,]

*Retired Senior Judge assigned to the Superior Court.

screamed to [Toothman] to "stop" several times. [Toothman] did not slow down or stop but, instead, went faster and "laughed." [Toothman] reached a speed in excess of 100 miles per hour. The vehicle hit the "jump" when the vehicle was traveling 70 or 80 mph, went "airborne" and then out of control. It left the roadway and crashed in a yard [of] a home. All three passengers suffered serious bodily injuries from the crash. [Toothman] did not appear to be intoxicated to the passengers in the vehicle before they had entered the vehicle. The exact amount of "beers" that [Toothman had] consumed and when is not clear, except that it was likely more than one. Further, since [Toothman] was treated for his injuries in Erie County, New York, it was difficult for the arresting officer, Officer Jeffrey Shade, to obtain his medical records, including his BAC results. [Officer Shade] did obtain blood that was drawn from [Toothman] 3 or 4 hours after the crash and had it tested. These BAC results were .103%.

Trial Court Opinion, 4/13/12, at 1-2.

Tootman was charged with driving under the influence of alcohol, accidents involving death or personal injury, driving while operating privilege suspended or revoked, reckless driving, careless driving, driving vehicle at safe speed, purchase, consumption, possession or transportation of liquor or malt or brewed beverages, aggravated assault, and recklessly endangering another person. **See** 75 Pa.C.S.A. §§ 3802(a)(1), 3742, 1543(b)(1), 3736(a), 3714(a), 3361; 18 Pa.C.S.A. §§ 6308(a), 2702(a)(1), 2705. On August 16, 2011, a preliminary hearing was held wherein Pascarella and Combs, among others, testified. Following the hearing, the charges were bound over for trial. Thereafter, Toothman filed a *habeas corpus* Motion, alleging that the Commonwealth had failed to establish a *prima facie* case as to the aggravated assault count. The Commonwealth filed an Answer to the

Motion. Following a hearing, the trial court granted Toothman's Motion and dismissed the count. The Commonwealth filed a timely Notice of appeal.

On appeal, the Commonwealth raises the following question for our review:

Whether the trial court erred in granting [Toothman's] Motion for *habeas corpus*, thereby dismissing the charge of aggravated assault for failure to establish a *prima facie* case, when the Commonwealth can prove that serious bodily injury occurred and that [Toothman] had the requisite *mens rea* for the offense of aggravated assault?

Brief for the Commonwealth at 3 (capitalization omitted).

Our standard of review for a grant of a *habeas corpus* petition is as follows:

The decision to grant or deny a petition for writ of *habeas corpus* will be reversed on appeal only for a manifest abuse of discretion.... Our scope of review is limited to deciding whether a *prima facie* case was established.... 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.

When deciding whether a *prima facie* case was established, we must view the evidence in the light most favorable to the Commonwealth, and we are to consider all reasonable inferences based on that evidence which could support a guilty verdict. The standard clearly does not require that the Commonwealth prove the accused's guilt beyond a reasonable doubt at this stage.

Commonwealth v. James, 863 A.2d 1179, 1181-82 (Pa. Super. 2004) (citations and brackets omitted).

A person is guilty of aggravated assault if he/she "attempts to cause serious bodily injury to another, or causes such injury intentionally,

knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life[.]” 18 Pa.C.S.A. § 2702(a)(1). Serious bodily injury is defined as “[b]odily 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.” 18 Pa.C.S.A. § 2301.

To prevail on a theory of recklessness in a prosecution for aggravated assault, the Commonwealth must show that the assailant’s recklessness rose to the level of malice, a crucial element of aggravated assault. Malice consists of a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty, although a particular person may not be intended to be injured. Motor vehicle crashes seldom result in an aggravated assault conviction because of the heightened *mens rea*. However, in some circumstances the malice requirement has been met, and this [C]ourt has not hesitated to uphold an aggravated assault or a third degree murder charge depending on the particular facts of a motor vehicle crash.

Commonwealth v. Miller, 955 A.2d 419, 422 (Pa. Super. 2008) (citations and quotation marks omitted); ***see also Commonwealth v. Kling***, 731 A.2d 145, 149 (Pa. Super. 1999) (indicating that “a conviction based on malice is appropriate where evidence demonstrates the element of *sustained recklessness* by a driver in the face of an *obvious risk of harm* to his victims.”) (emphasis in original).

The Commonwealth contends that the record established that a *prima facie* case was presented as to the aggravated assault charge. Brief for the Commonwealth at 9. The Commonwealth argues that the evidence

demonstrated that Toothman acted with malice and caused serious bodily injury to multiple victims by continuing to recklessly drive the vehicle even after the passengers told him to slow down and stop. *Id.* at 9, 12-13. The Commonwealth asserts that the evidence also shows that Toothman had been drinking throughout the day prior to driving the vehicle; that he nearly struck several parked vehicles; that he swerved off the road at one point; that he was travelling over 90 mph in a 35 mph zone; that he laughed when the passengers told him to stop; and that he accelerated into the jump, which led to the accident. *Id.* at 13-14. The Commonwealth claims that the totality of the evidence demonstrates a sustained recklessness in the face of an obvious risk of harm to the passengers and thus, a *prima facie* case for the aggravated assault charge. *Id.* at 14. The Commonwealth contends that the trial court's reliance on ***Commonwealth v. McHale***, 858 A.2d 1209 (Pa. Super. 2004),¹ is unavailing. Brief for the Commonwealth at 10-11.

At the preliminary hearing, Pascarella testified that on June 16, 2009, she, Combs, and Lucco got into a vehicle that was being driven by Pascarella's boyfriend, Toothman. N.T., 8/16/11, at 11-12. Pascarella

¹ In ***McHale***, the defendant, who did not have a valid driver's license or insurance coverage, elected to drive a car, after consuming a large amount of alcohol. ***McHale***, 858 A.2d at 1211-12. An off-duty police officer saw defendant's car, which was traveling at a high rate of speed, come into contact with a car parked on the side of the road and then collided with and injured two people who had been standing near the car. *Id.* at 1211. This Court overturned the defendant's conviction for aggravated assault, concluding that while the defendant's actions were clearly negligent and worthy of criminal penalty, they did not present the requisite *mens rea* to show malice. *Id.* at 1216-18.

stated that after Toothman began to drive, he went off the road, after which Pascarella told him to "pay attention." *Id.* at 13. Toothman responded that "we're fine," and began driving the vehicle at a higher rate of speed. *Id.* Toothman stated that he was driving fast so he could hit a little "jump." *Id.* at 14, 15. Pascarella indicated that she and Combs both told him to slow down multiple times. *Id.* at 13, 14. Thereafter, Pascarella and Combs screamed at Toothman several times to stop the vehicle. *Id.* at 14-15. Toothman failed to slow down and Pascarella stated that he was travelling at 97 mph. *Id.* at 15. After Toothman hit the jump, the vehicle crashed into a yard. *Id.* at 15-16. As a result of the accident, Pascarella suffered permanent injuries, as she had suffered minor memory loss, a torn rotator cuff, a fractured elbow, sacrum, hip, and ribs, and a collapsed lung. *Id.* at 18.

Combs testified that she was with Toothman on June 16, 2009, and that he was drinking alcohol. *Id.* at 26, 29. Combs indicated that she was pregnant at that time. *Id.* at 28. Combs stated that she got into a vehicle, driven by Toothman, to get more food and beer. *Id.* at 32, 33-34. Combs testified that Toothman almost struck several parked vehicles as he began to drive. *Id.* at 35. Combs confirmed Pascarella's testimony as to Toothman's actions while driving, *i.e.*, the repeated attempts to get Toothman to stop, and Toothman's response of laughing at the pleas to stop. *Id.* at 35-38. Combs also indicated that Toothman wanted to jump a berm on the road

that allows a vehicle to become airborne if the vehicle is going fast. *Id.* at 37. As a result of the accident, Combs stated that her injuries, including a broken arm, collarbone, and ribs, and a fractured hip and pelvis, were permanent. *Id.* at 42.

Officer Shade testified that he responded to the accident, and found that Toothman "smelled heavily of alcohol." *Id.* at 65. Officer Shade stated that Toothman's blood alcohol content was 0.103%. *Id.* at 75.

Here, the trial court found that this evidence did not establish a *prima facie* case that Toothman acted with malice for the following reasons:

[Toothman] did have some advance notice that he could cause injury as the other occupants in the car were screaming at him to slow down and stop. Therefore, the issue is whether the passengers' screams to slow down and stop, in combination with all other factors, placed [Toothman] on notice that his actions (driving fast to hit a "jump") would most certainly lead to serious injury or death? When addressing this issue not only how it was said, [*sic*] that the passengers were screaming, [*sic*] has to be considered, but also exactly what was said has to be considered. For example, if the passengers were yelling "slow down, the bridge is washed out, you are going to crash and we are all going to die," the words would relay certainty of harm. But that is not the case here. No other statements, other than "slow down" and "stop," were testified to having been made. It could be, and in fact has been, argued that common sense dictates that screaming at someone when they were going at a high rate of speed puts them on notice that, if they don't slow down, someone could get seriously hurt. There is certainly no arguing with the accuracy of that statement. However, and again, it doesn't demonstrate that there is a certainty, to the same level that if [Toothman] specifically intended to injure the passengers. [Toothman] went very fast, 70 or 80 mph[,], when he hit the "jump." Like the conduct in *McHale*, this was clearly negligent and foolish conduct, but, the facts do not support a finding that [Toothman's] conduct was so extreme and reckless that it should be treated as if he intended to crash and injure the passengers.

Trial Court Opinion, 4/13/12, at 4 (footnote omitted).

Contrary to the trial court's finding, "[m]alice has been found to exist where an accident caused by a reckless motorist follows pleas from others to stop." **Miller**, 955 A.2d at 423; **see also Kling**, 731 A.2d at 150 (stating that malice can be found in the acts of a reckless motorist where "there was a plea from others to stop, or a near-miss preceding the eventual crash," because this evidenced a sustained recklessness). In this case, both Pascarella and Combs repeatedly screamed for Toothman to stop the vehicle. Toothman ignored the pleas to stop and responded by laughing at the passengers. Toothman was also driving at an excessive speed and had numerous close calls as he was driving, including nearly striking parked cars and swerving off the road. Here, Toothman "had adequate time to calculate and reflect upon the consequences of his reckless conduct, thus rendering the choice to continue it malicious." **Kling**, 731 A.2d at 150. Therefore, upon reviewing the totality of the evidence, the Commonwealth showed sufficient probable cause that Toothman exhibited a sustained recklessness in causing the accident, and acted with malice. **See Commonwealth v. Scales**, 648 A.2d 1205, 1208 (Pa. Super. 1994) (concluding that "malice could be inferred by the driver's sustained disregard for the lives and safety of people and vehicles in his path, evidenced by his failure to slow down despite warnings to do so, and refusal to apply the brakes upon sideswiping another automobile and swerving onto the sidewalk."); **Commonwealth v.**

Urbanski, 627 A.2d 789, 793-94 (Pa. Super. 1993) (concluding that a driver who had caused a collision, after ignoring pleas from his wife to slow down and stop driving erratically, acted with malice); **Commonwealth v. Pigg**, 571 A.2d 438, 442 (Pa. Super. 1990) (concluding that an intoxicated tractor-trailer driver who forced several vehicles off a road, ignored requests to stop driving, and killed two people after he crashed into their vehicle acted with malice as the driver knew he posed a danger to others and continued to pursue such a course of conduct).² Moreover, as a result of the accident, both Pascarella and Combs suffered serious bodily injuries. Thus, the Commonwealth established a *prima facie* case that Toothman committed aggravated assault. Accordingly, we reverse the trial court's Order granting Toothman's *habeas corpus* Petition, and remand to the trial court with direction to proceed to trial on all of the counts, including aggravated assault.

Order reversed. Case remanded for further proceedings. Jurisdiction relinquished.

² We note that based upon the foregoing facts and case law, we conclude that the reasoning set forth in **McHale** does not apply to this case.