NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JUSTIN WEBER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 79 EDA 2013

Appeal from the Judgment of Sentence Entered November 26, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0009525-2012

BEFORE: BENDER, J., PANELLA, J., and FITZGERALD, J.*

MEMORANDUM BY BENDER, J. **FILED OCTOBER 17, 2013**

Appellant, Justin Weber, appeals from the judgment of sentence of six months' probation, a fine of $300, drug/alcohol assessment and treatment, and highway safety school, imposed after he was convicted at a bench trial of driving under the influence of alcohol, pursuant to 75 Pa.C.S. § 3802(a)(1). Appellant challenges the sufficiency of the evidence to establish the elements of the offense. We affirm.

The trial court provided the following factual history:

> On February 26, 2012 at approximately 3:00 A.M. on the 2300 block of South 19th Street, Police Officer Michael Baranesh was on regular police patrol when he observed a dark green Honda Civic that was blocking a fire hydrant. (N.T. 5-6). The car's lights were on, the engine was running, and the Defendant

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* Former Justice specially assigned to the Superior Court.

> was slumped down inside of the car in the driver's seat with his eyes closed, his chin on his chest, and his hands folded on his lap. (N.T. 6-8). All four of the windows were up and loud music was coming from inside of the car. (N.T. 8).
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> Officer Baranesh called over the police radio for backup and Police Officer Uzeienski arrived at the scene. (N.T. 9). When Officer Baranesh attempted to open the car doors, he found that they were locked. (N.T. 9). Both officers began yelling, banging loudly on the driver side window and front windshield, and rocking the vehicle to attempt to rouse the Defendant. (N.T. 10). The Defendant did not respond.
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> The police officers attempted to rouse the Defendant for five to ten minutes but the Defendant remained "in a state of sleep or in an unconscious state." (N.T. 10). Five minutes later, the police waved down a private tow truck driver who was able to open the car door using a "slim-jim" tool. (N.T. 12).
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> Once the police opened the car door, Officer Baranesh leaned in approximately six to twelve inches from the Defendant, screamed at him, and clapped his hands very loudly three or four times. (N.T. 13). The Defendant still did not respond. (N.T. 13) Officer Baranesh then grabbed the Defendant by both shoulders and gently shook him. (N.T. 13). The Defendant then woke up. (N.T. 13-14). Officer Baranesh asked the Defendant if he was alright, if he knew where he was, and if he could hear the officer. (N.T. 14). The Defendant replied, "Yes, I only drank, please just don't fuck me up." (N.T. 14-15).
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> Officer Baranesh asked the Defendant to step out of the vehicle and observed that the Defendant had slurred speech as well as watery and "very dilated" eyes. The officer also observed that the Defendant was incoherent, confused, and "wobbly under his own power and staggering." (N.T. 15-16).
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> The Defendant was transported to the Police Detention Unit at approximately 6:43 A.M. where Police Officer Mark Eib met with the Defendant and observed bloodshot eyes. (N.T. 26).

Trial Court Opinion (T.C.O.), 3/5/13, at 1-3.

On November 26, 2012, the trial court convicted Appellant of driving under the influence of alcohol. On December 14, 2012, Appellant timely filed a notice of appeal and, upon direction of the trial court, he also filed a timely concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

In his brief on appeal, Appellant presents two issues. First, whether there was sufficient evidence in the record to establish that Appellant was in "physical control" of the vehicle, pursuant to 75 Pa.C.S. § 3802(a)(1). Second, whether there was sufficient evidence in the record to establish alcohol impairment under 75 Pa.C.S. § 3802(a)(1).

> When reviewing a challenge to the sufficiency of the evidence, we must determine if the Commonwealth established beyond a reasonable doubt each of the elements of the offense, considering the entire trial record and all of the evidence received, and drawing all reasonable inferences from the evidence in favor of the Commonwealth as the verdict-winner. The Commonwealth may sustain its burden of proof by wholly circumstantial evidence.

Commonwealth v. Segida, 985 A.2d 871, 880 (Pa. 2009) (citations omitted).

Section 3802(a)(1) of the Vehicle Code, 75 Pa.C.S. §§ 101-9805, provides:

> An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

75 Pa.C.S. § 3802(a)(1).

Initially, the Commonwealth argues that Appellant's first issue is waived because the issue of physical control was not raised in Appellant's Pa.R.A.P. 1925(b) statement. The Commonwealth is correct that the issue of "physical control" was not raised. Accordingly, despite the fact that the trial court addressed this claim in its Pa.R.A.P. 1925(a) opinion, we are compelled to find the issue waived. As this Court has consistently held, when challenging the sufficiency of the evidence on appeal, the appellant's 1925(b) statement must specify the element or elements upon which the evidence was insufficient in order to preserve the issue for appeal. ***Commonwealth v. Gibbs***, 981 A.2d 274, 281 (Pa. Super. 2009).

However, even if this issue were properly preserved, we would conclude that it is without merit. We have held that "actual physical control" of a vehicle need not be established by direct evidence of a defendant's driving the vehicle, but can, instead, be established by circumstantial evidence. ***Segida***, 985 A.2d at 880. In determining whether a defendant was in "actual physical control" of a vehicle, we have directed that the fact-finder may consider whether the engine is running, the location of the vehicle, and additional evidence showing that the defendant had driven the vehicle. ***Commonwealth v. Woodruff***, 668 A.2d 1158, 1161 (Pa. Super. 1995).

In the case at bar, the trial court delineated evidence sufficient to establish actual physical control. Specifically, the court explained,

> The police found the [Appellant] passed out in the driver's seat with the engine running and the headlights on. (N.T. 6-8). Also, the [Appellant] was parked illegally in front of a fire hydrant approximately sixteen to eighteen blocks from his home. (N.T. 5-6, 17). The police did not find the [Appellant] in a parking lot where he was "sleeping it off," but rather in a street, blocking a fire hydrant. This supports a reasonable inference that the [Appellant] had driven the car that night and was in "actual physical possession of the vehicle."

T.C.O. at 5. We agree. There is sufficient evidence of record to establish Appellant's actual physical control of the vehicle. Accordingly, even if Appellant properly preserved this issue, we would conclude that it is without merit.

In his second issue, Appellant asserts that there was insufficient evidence to establish alcohol impairment under 75 Pa.C.S. § 3802(a)(1). He asserts that, "In this case, there is no evidence of alcohol. There is no test that determines the Appellant's BAC level. There is no evidence of smell. In short, there is no evidence of alcohol consumption whatsoever." Appellant's Brief at 12.

The Commonwealth counters that Appellant admitted that alcohol was the cause of his impairment. "Defendant's first words when Officer Baranesh asked if he was alright were 'Yes, I only drank.'" Commonwealth's Brief at 8

(citing N.T., 11/26/12, at 14-15).[1] Moreover, the trial court found Officer Baranesh's testimony credible, explaining:

> The court also found credible the expert opinion of Officer Baranesh that the Defendant could not safely operate a motor vehicle. Officer Baranesh, who has personally made 25-40 arrests for individuals charged with driving under the influence of alcohol ("DUI") and has been involved with "hundreds" of similar arrests, concluded that the Defendant was driving under the influence of alcohol and could not safely operate a vehicle. (N.T. 16-17). He based his conclusion on his observations that the Defendant was unresponsive and was slumped down in the driver's seat. Once the police woke the Defendant up, the police observed that the Defendant was incoherent, confused, had dilated eyes slurred speech, and was "unable to stand under his own power." Additionally, the Defendant admitted that he had been drinking. (N.T. 18-19).

T.C.O. at 6.

Appellant argues that Officer Baranesh's testimony was equivocal on this issue because, despite his initial conclusion that Appellant was under the influence of alcohol, upon cross-examination the officer testified that he was not sure whether Appellant was under the influence of alcohol or narcotics. Specifically, Officer Baranesh stated:

> Q. Okay, so did you think he was under alcohol or narcotics, which one, or you're not sure?

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[1] Appellant, without citation to law, claims that this remark is hearsay. Appellant's Brief at 13. However, Appellant did not object to Officer Baranesh's testimony at trial. N.T., 11/26/12, at 14-15. Moreover, the Commonwealth observes that Appellant's statement would be excepted from the rule against hearsay as an admission by a party-opponent. Commonwealth's Brief at 8 (citing Pa.R.E. 803(25); ***Commonwealth v. Edwards***, 903 A.2d 1139, 1157-58 (Pa. 2006)).

A. I'm not sure.

Q. Not sure? So it could be narcotics, fair statement?

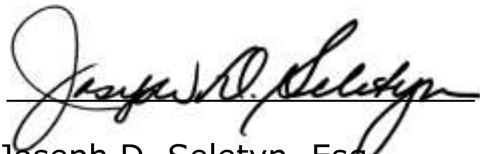
A. Fair statement.

N.T., 11/26/12, at 22.

This testimony, however, did not disprove the other evidence that Appellant was under the influence of alcohol, namely Appellant's own statement to that effect and the officer's conclusions in light of numerous similar arrests. Resultantly, the trial court was presented with sufficient evidence to conclude, beyond a reasonable doubt, that Appellant was in actual physical control of the vehicle while under the influence of alcohol, thus satisfying the elements of 75 Pa.C.S. § 3802(a)(1).

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/17/2013