NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOSEPH TARRENCE CIRAFICI, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 307 MDA 2013

Appeal from the Judgment of Sentence January 24, 2013
in the Court of Common Pleas of Columbia County
Criminal Division at No.: CP-19-CR-0000024-2011

BEFORE: PANELLA, J., MUNDY, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. **FILED NOVEMBER 06, 2013**

Appellant, Joseph Tarrence Cirafici, appeals from the judgment of sentence entered on January 24, 2013, following his conviction of two counts of driving under the influence (DUI).[1] We affirm.

On November 15, 2010, at approximately 7:00 p.m., State Trooper Brian Hook was patrolling on Route 487 when he observed Appellant driving a truck and pulling a trailer with a broken trailer light. (N.T. Trial, 11/09/12, at 5-6). Trooper Hook followed the vehicle and saw Appellant fail to use a turn signal when making a right turn; after the turn, Appellant crossed the center line and drove at approximately twelve to fourteen miles an hour over

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* Retired Senior Judge assigned to the Superior Court.

[1] 75 Pa.C.S.A. §§ 3802(a)(1) and (2).

the speed limit for three tenths of a mile. (***See id.*** at 7-8). Trooper Hook activated his lights and Appellant pulled into a stone, sloped driveway. (***See id.*** at 8, 10). When Trooper Hook approached Appellant, he smelled an odor of alcohol, and noticed that Appellant's eyes were glassy and bloodshot and his speech was slurred. (***See id.*** at 11). Appellant was not able to produce all of the documentation requested by Trooper Hook. (***See id.*** at 12). Because there was a passenger in the car, Trooper Hook had Appellant exit the vehicle so that he could verify that Appellant, not the passenger, smelled of alcohol. (***See id.*** at 13-14). Appellant admitted that he had been drinking. (***See id.*** at 14). Trooper Hook did not have Appellant perform any field sobriety tests because of the uneven driveway surface; however, he arrested Appellant and took him to the DUI Processing Center. (***See id.*** at 14). Patrolman Kenneth Auchter performed two breath tests on Appellant. The lower of the two blood alcohol content (BAC) scores was .089%.[2] (***See id.*** at 21, 32).

The trial court found Appellant guilty of the above-mentioned charges following a November 9, 2012 bench trial. On January 24, 2013, the trial court sentenced Appellant to a term of intermediate punishment of not less than eighteen months. On January 30, 2013, Appellant filed a timely post-

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[2] The trial transcript incorrectly states that Appellant's BAC was .09%, but the breath test machine strip, admitted as Commonwealth Exhibit 11, and subsequent questioning by defense counsel; demonstrate that the correct BAC was .089%. (***See*** N.T. Trial, 11/09/12, at 33-34).

sentence motion, which the trial court denied on January 31, 2013. The instant, timely appeal followed. Appellant filed a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) on February 25, 2013; the trial court subsequently issued an opinion. ***See*** Pa.R.A.P. 1925.

On appeal, Appellant raises the following issues for our review:

> 1. Whether the evidence is insufficient to sustain the guilty verdict on the charge of driving under the influence of alcohol in violation of 75 Pa.C.S. §3801(a)(1)?
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> 2. Whether the evidence is insufficient to sustain the guilty verdict on the charge of driving under the influence of alcohol in violation of 75 Pa.C.S. §3802(a)(2)?
>
> 3. Whether Appellant is entitled to a new trial because the trial court erred in overruling his objection to the admission into evidence of certain certificates regarding the breath testing device which was utilized in this case when the individuals who signed and issued the certificates were not present in court to testify and be cross-examined by Appellant's counsel?

(Appellant's Brief, at 5).

Appellant's first two issues on appeal challenge the sufficiency of the evidence. (***See*** Appellant's Brief, at 9-18). Our standard for reviewing the sufficiency of the evidence is well-settled.

> The standard we apply when 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 the above 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. Furthermore, when reviewing a sufficiency claim, our Court is required to give the prosecution the benefit of all reasonable inferences to be drawn from the evidence.
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> However, the inferences must flow from facts and circumstances proven in the record, and must be of such volume and quality as to overcome the presumption of innocence and satisfy the jury of an accused's guilt beyond a reasonable doubt. The trier of fact cannot base a conviction on conjecture and speculation and a verdict which is premised on suspicion will fail even under the limited scrutiny of appellate review.

Commonwealth v. Bostick, 958 A.2d 543, 560 (Pa. Super. 2008), *appeal denied*, 987 A.2d 158 (Pa. 2009) (quoting ***Commonwealth v. Smith***, 956 A.2d 1029, 1035-36 (Pa. Super. 2008) (*en banc*)).

Appellant challenges the sufficiency of the evidence underlying his DUI convictions. Appellant was convicted of DUI pursuant to 75 Pa.C.S.A. §§ 3802(a)(1) and (2), which provide:

> **§ 3802. Driving under influence of alcohol or controlled substance**
>
> **(a) General impairment.**
>
> (1) 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.
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> (2) 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 alcohol concentration in the individual's blood or breath is at least 0.08% but less than 0.10% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

75 Pa.C.S.A. §§ 3802(a)(1), (2).

To have sufficient evidence to establish a conviction under 75 Pa. C.S.A. § 3802(a)(1), the Commonwealth must prove that Appellant operated the car and that he "imbib[ed] a sufficient amount of alcohol such that [he was] rendered incapable of safely driving." ***Commonwealth v. Griffith***, 32 A.3d 1231, 1238 (Pa. 2011). The Commonwealth does not need to prove that the defendant consumed a specific amount of alcohol. ***See id.*** In other words, the Commonwealth must demonstrate "that alcohol has substantially impaired the normal mental and physical faculties required to safely operate the vehicle." ***Commonwealth v. Palmer***, 751 A.2d 223, 228 (Pa. Super. 2000) (citation omitted). We have defined "[s]ubstantial impairment" as "a diminution or enfeeblement in the ability to exercise judgment, to deliberate or to react prudently to changing circumstances and conditions." ***Id.*** (citation omitted). Evidence used to prove this impairment may include erratic driving, not being in control of the vehicle, or failing to pass field sobriety tests. ***See id.***

Here, as delineated above, Appellant failed to use a turn signal, drove over the centerline, and was speeding. (N.T. Trial, 11/09/12, at 7-8). His eyes were bloodshot and glassy, he smelled of alcohol, and his speech was slurred. (***See id.*** at 11-12). Appellant admitted he had been drinking. (***See id.***). This evidence was more than sufficient to sustain a conviction under 75 Pa.C.S.A. § 3802(a)(1). ***See Commonwealth v. Kerry***, 906 A.2d 1237, 1241-42 (Pa. Super. 2006) (holding that evidence was sufficient to sustain a conviction under section 3802(a)(1) where the appellant smelled of alcohol, had alcohol on his person, had bloodshot and glassy eyes, and slurred his speech); ***Commonwealth v. Gruff***, 822 A.2d 773, 781-82 (Pa. Super. 2003), *appeal denied*, 863 A.2d 1143 (Pa. 2004) (holding that evidence was sufficient to sustain a DUI conviction under the predecessor to section 3802(a)(1) where the appellant was speeding, smelled of alcohol, had bloodshot eyes, and admitted to drinking). Appellant's first sufficiency of the evidence claim is lacking in merit.

Appellant also claims that the evidence was insufficient to sustain his conviction under 75 Pa.C.S.A. § 3802(a)(2). (***See*** Appellant's Brief, at 16-18). In order to sustain a conviction under 75 Pa.C.S.A. § 3802(a)(2), the Commonwealth must establish that the appellant's BAC was at least .08% or greater within two hours after the appellant last drove or operated a motor vehicle. ***See*** 75 Pa.C.S.A. § 3802(a)(2). Here, Patrolman Auchter testified that Appellant's BAC, which was taken within two hours of Appellant's

operation of a motor vehicle, was .089%. (***See*** N.T. Trial, 11/09/12, at 21-22, 32-34). Appellant attempts to undermine this testimony by arguing that the limit of .020 difference between consecutive test results, as established by 67 Pa. Code § 77.24(b)(2)(i), should somehow be construed as a general margin of error of .020 applicable to any test result and that, therefore, we should subtract .020 from .089% and arrive at a BAC of .069%. (***See id.*** at 33-34; Appellant's Brief, at 16-18). However, Appellant does not provide any legal support for this novel theory, and in the absence of such support, we decline to create such a formulation. (***See*** N.T. Trial, 11/09/12, at 37-38; ***see*** Appellant's Brief, at 16-18). Appellant's second sufficiency of the evidence claim lacks merit.

In his final issue, Appellant claims that he is entitled to a new trial because the trial court violated his constitutional right to confront a witness because of the admission of certificates of accuracy and calibration of the breath testing device and of the certificates of analysis of the simulator solutions used in performing required periodic accuracy and calibration tests of the device. (***See*** Appellant's Brief, at 18-20). We disagree.

> The Sixth Amendment to the United States Constitution provides: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . Article 1, Section 9 of the Pennsylvania Constitution provides: In all criminal prosecutions the accused hath a right . . . to be confronted with the witnesses against him. . . . With regard to the Confrontation Clause, the Pennsylvania Constitution provides a criminal defendant with the same protection as the Sixth Amendment; thus, we will address Appellant's challenges under each Constitution simultaneously. When reviewing a question of

> law, our standard of review is *de novo*, and our scope of review is plenary.

Commonwealth v. Atkinson, 987 A.2d 743, 745 (Pa. Super. 2009), *appeal denied*, 8 A.3d 340 (Pa. 2010) (footnotes, citations, and quotation marks omitted). In a recent decision, the Pennsylvania Supreme Court addressed the exact issue raised by Appellant and conclude "the calibration and accuracy certificates were nontestimonial in nature because they were not prepared for the primary purpose of providing evidence in a criminal case, and their admission into evidence did not violate appellant's Confrontation Clause rights." ***Commonwealth v. Dyarman***, 2013 WL 4436220, at *3 (Pa. August 20, 2013) (footnote omitted). This is binding precedent and, therefore, Appellant's claim must fail.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/6/2013