NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. CORY LEE HARRINGTON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 858 MDA 2012

Appeal from the Judgment of Sentence of April 19, 2012
In the Court of Common Pleas of Adams County
Criminal Division at No(s): CP-01-CR-0000765-2011

BEFORE: BOWES, J., OLSON, J., and WECHT, J.

MEMORANDUM BY WECHT, J.: **FILED MAY 22, 2013**

Cory Lee Harrington ("Appellant") appeals from the judgment of sentence entered April 19, 2012.[1] After careful review, we affirm.

The trial court summarized the case's history as follows:

> On June 27, 2011, Eastern Adams Regional Police Sergeant Ramsburg observed a green Nissan sedan traveling westbound in the center turn lane of York Road, Oxford Township, Adams County. The vehicle was traveling approximately 50 miles per hour in the turn lane as if it was the westbound lane. Sergeant Ramsburg, assisted by Eastern Adams Regional Police Officer Mulder, conducted a vehicle stop. Officer Mulder approached the

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[1] Appellant purports to appeal his April 11, 2012 verdict. However, the appeal properly lies from his judgment of sentence. ***Commonwealth v. O'Neill***, 578 A.2d 1334, 1335 (Pa. Super. 1990) ("In criminal cases appeals lie from judgment of sentence rather than from the verdict of guilt…."). We have corrected the caption accordingly.

> driver's side of the vehicle and observed the Appellant …, to be the operator of the motor vehicle. When Officer Mulder requested Appellant's information, he noticed a strong odor of gasoline emitting from Appellant and his vehicle. Officer Mulder's inquiry concerning the odor of gasoline resulted in Appellant explaining he "did not know why" he smelled. Appellant was unable to provide his personal information, however, kept handing Officer Mulder money claiming that it was his driver's license. Officer Mulder described Appellant as being very confused and disoriented. When asked if he had been drinking, Appellant indicated that he had had four beers but felt fine. Officer Mulder requested Appellant to step out of the vehicle so that he may speak with him. When Appellant exited the vehicle, Officer Mulder noticed his belt was undone, he had on no shoes, and that his appearance was dirty. Appellant explained to the officer that he did not know where or how he got like that. After the administration of field sobriety tests, Officer Mulder determined Appellant to be under the influence of an intoxicant to the extent that he was incapable of safe driving. Appellant conceded that he was drunk and was placed under arrest. Appellant was taken to Gettysburg Hospital for a blood draw. While at the hospital, Appellant admitted to ingesting the controlled substance, Ambien, prior to driving. A subsequent blood test revealed the presence of Zolpidem in Appellant's blood at a level of 440 ng/mL.[1]
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> [1] Zolpidem is the generic name for Ambien.
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> Appellant was charged with driving under the influence of a controlled substance in violation of 75 Pa.C.S.A. § 3802(d)(2) of the Pennsylvania Motor Vehicle Code (relating to driving under the influence of any drug which impairs the individual's ability to safely drive).

Trial Court Opinion ("T.C.O."), 6/22/2012, at 1-2.

On April 11, 2012, following a non-jury trial, Appellant was found guilty of driving under the influence. On April 19, 2012, Appellant was

sentenced to sixty months in the Intermediate Punishment Program.[2] On May 7, 2012, Appellant filed the instant appeal.[3]

Appellant raises three issues on appeal:

1. Did the Court err in refusing to recognize a defense of involuntary intoxication with regard to Appellant's ingestion of a prescription medication, specifically Ambien (zolpidem), in violation of Appellant's due process rights guaranteed to him through the Fourteenth Amendment of the United States Constitution and Article I, Section 9 of the Constitution of Pennsylvania?
2. Did the Court erroneously consider evidence from the Commonwealth's expert who testified as to the amount of Ambien (zolpidem) Appellant had allegedly ingested, using a method not generally accepted by the relevant scientific community, as required by Rule of Evidence 702?
3. Did the Court erroneously disregard evidence from Appellant's expert, and corroborated by the Commonwealth's expert, that Ambien is not a cumulative drug, that is to say, taking more than the prescribed dosage of 10mg had zero effect on Appellant's intoxication?

Appellant's Brief at 4.

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[2] A county intermediate punishment program may provide options for housing an offender full or part time, restricting movement, and monitoring the offender. 42 Pa.C.S.A. § 9804. While we do not have the transcript from Appellant's sentencing, it appears he was to serve six months in county jail with work release ("Phase I"), six months on house arrest ("Phase II"), and the remaining time under "Intensive Supervision" or some variation thereof ("Phases III through V"). Order, 4/19/2012; Standard Rules of the Intermediate Punishment Program, 4/19/2012.

[3] The trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied.

Initially, Appellant frames his first issue as a constitutional challenge. However, in his brief, Appellant does not present a constitutional argument.[4] Appellant states only that "[i]nvoluntary intoxication is … an embodiment of [the] due process requirement that the Commonwealth must prove that a defendant voluntarily acted with a culpable mind." Appellant's Brief at 15. This statement indicates that Appellant's argument is a sufficiency of the evidence argument, rather than a constitutional one.[5]

When reviewing a sufficiency of the evidence claim:

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[4] Nor is there anything in the record to indicate that Appellant was deprived of any due process right. The trial court allowed Appellant to testify about his use of Ambien. The court further permitted Appellant's expert to refute the Commonwealth's expert on the amount of Ambien in Appellant's body, and to testify that Appellant's behavior was due to an unexpected reaction to Ambien. At most, Appellant might have argued that the trial court's pre-trial ruling that it would not give an explicit jury instruction on involuntary intoxication caused Appellant to waive his right to a jury trial. However, had Appellant made that argument, it would have been belied by the record, which shows that Appellant waived his right to a jury trial in exchange for the Commonwealth's agreement to cap Appellant's sentence in the event of a guilty verdict. Notes of Testimony ("N.T."), 4/11/2012, at 4-6.

[5] At oral argument, Appellant represented that he was advancing an argument regarding the weight of the evidence. A claim that a verdict is against the weight of the evidence must be raised before the trial court in an oral motion prior to sentencing, a written motion before sentencing, or in a post-sentence motion. Pa.R.Crim.P. 607(A); ***Commonwealth v. Barnhart***, 933 A.2d 1061, 1066 (Pa. Super. 2007). If the claim is not raised in the trial court, it is waived. ***Barnhart***, 933 A.2d at 1066. There is no indication in the certified record that a weight of the evidence claim was raised properly before the trial court. Therefore, to the extent asserted in this appeal, Appellant's weight of the evidence claim is waived.

> our applicable standard of review is whether the evidence admitted at trial, and all reasonable inferences drawn from that evidence, when viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to enable the factfinder to conclude that the Commonwealth established all of the elements of the offense beyond a reasonable doubt. Additionally, when examining sufficiency issues, we bear in mind that: the Commonwealth's burden may be sustained by means of wholly circumstantial evidence; the entire trial record is evaluated and all evidence received against the defendant considered; and the trier of fact is free to believe all, part, or none of the evidence when evaluating witness credibility.

Commonwealth v. Crabill, 926 A.2d 488, 490-91 (Pa. Super. 2007) (internal citations omitted).

Appellant appears to argue that the Commonwealth did not adequately prove that Appellant committed a voluntary act. Appellant contends that the evidence demonstrated that the Ambien he had ingested led to involuntary actions as a result of an unexpected reaction to that drug. Appellant's Brief at 15-19.

The Commonwealth contends that Appellant did not meet his burden of proof to establish the defense of involuntary intoxication. The Commonwealth notes that the trial court did not find Appellant credible and that this Court cannot disturb that finding, absent an abuse of discretion by the trial court. Commonwealth's Brief at 6-8.

The trial court found sufficient evidence for a conviction, citing the testimony of Sergeant Ramsburg and Officer Mulder. Appellant was observed operating his vehicle in an "erratic and dangerous" manner. Appellant was "disheveled and confused" and failed multiple field sobriety

tests. Blood tests confirmed that Appellant had Ambien (or zolpidem) in his system. The trial court concluded that this was sufficient to demonstrate that Appellant was operating a vehicle under the influence of a controlled substance that rendered him incapable of operating the vehicle safely. Further, the trial court did not find Appellant's testimony regarding involuntary intoxication credible, and found that the evidence did not support an involuntary intoxication defense. T.C.O. at 6-8.

Appellant was convicted of driving under the influence of a drug that impaired his ability to drive safely. That statute reads:

> **(d) Controlled substances.--**An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
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> * * *
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> (2) The individual is under the influence of a drug or combination of drugs to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle.

75 Pa.C.S.A § 3802(d)(2). For a conviction, the Commonwealth must prove only that the defendant was under the influence of a drug to a degree that impairs the ability to drive safely. ***Commonwealth v. Williamson***, 962 A.2d 1200, 1204 (Pa. Super. 2008). There is no requirement that any specific amount be ingested or that any particular quantity of the drug be present in the blood stream. ***Id.*** Further, expert testimony is not required to establish that the drug caused the inability to drive safely, even in the

case of a prescription medication. ***Commonwealth v. Griffith***, 32 A.3d 1231, 1238 (Pa. 2011).

The road where Appellant was driving was comprised of three lanes, one in each direction, and the center left-turn lane to be used by cars coming from either direction. N.T. at 15, 19. Appellant was driving in the center turn lane for approximately a half mile, but never turned or attempted to turn. N.T. at 15. When stopped, Appellant was disheveled and unable to comply with requests for his license and registration. N.T. at 17, 24-26. He failed three field sobriety tests. N.T. at 18, 27-30. Sergeant Ramsburg and Officer Mulder concluded that Appellant was incapable of driving safely. N.T. at 18, 30. The Commonwealth's toxicology expert, Edward Barbieri, Ph.D., testified that Appellant's blood test was positive for zolpidem. N.T. at 41. That evidence, which the trial court found to be credible, sufficed to support Appellant's conviction.

Appellant argued that he was involuntarily intoxicated. Involuntary intoxication is an affirmative defense; the burden of proof lies with the defendant to prove the defense by a preponderance of the evidence. ***Commonwealth v. Collins***, 810 A.2d 698, 701 (Pa. Super. 2002).[6] The

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[6] Whether involuntary intoxication is a defense to driving under the influence is an open question in our decisional law. ***Collins***, 810 A.2d at 700 ("[W]hether involuntary intoxication is a defense to a DUI charge is unclear in Pennsylvania."); ***see also Commonwealth v. Smith***, 831 A.2d 636, 641 (Pa. Super. 2003) ("[E]ven if we were to assume that [an involuntary intoxication] defense is cognizable under Appellant's theory, she still cannot
(Footnote Continued Next Page)

trial court did not find credible Appellant's testimony that he could not recall the specific day of the incident. T.C.O. at 6; N.T. at 67. Appellant also could not recall reading the pamphlet or the warnings that came with his prescription. N.T. at 69. The trial court noted that Appellant testified that he sometimes took more than the prescribed amount of Ambien. T.C.O. at 7; N.T. at 71. The trial court also did not find Appellant's toxicology expert, Lawrence Guzzardi, M.D., persuasive in his testimony that Appellant's behavior could be explained by the phenomenon of "sleep driving." T.C.O. at 7; N.T. at 84-86.

Credibility determinations are to be made by the fact-finder, in this case the trial judge; an appellate court may not substitute its judgment for that of the fact-finder. ***Commonwealth v. Hanible***, 30 A.3d 426, 443 n.11 (Pa. 2011). Based upon the credibility determinations that bind us, it is clear that Appellant did not meet his burden of proving by a preponderance of the evidence his affirmative defense of involuntary intoxication. We find no error in the trial court's conclusion that the evidence sufficed to prove that Appellant violated section 3802(d)(2) and that the evidence failed to show that Appellant was involuntarily intoxicated.

(Footnote Continued)

show that the trial court erred in rejecting this defense because she has failed to establish the necessary factual foundation…."). Ultimately, we need not resolve this question.

Appellant's remaining issues concern the expert testimony at trial. Appellant combines his argument on those issues. The first issue questions whether Dr. Barbieri's testimony concerning the dosage Appellant took is accepted by the scientific community. The police lab performed its test using whole blood. N.T. at 43. However, the scientific literature correlating the amount of Ambien in the blood to the dose taken is based upon amounts found in blood serum or plasma. N.T. at 46-47. Dr. Barbieri estimated a conversion of 0.6 to 1.2 based on his experience with other therapeutic medications, *i.e.* the amount of Ambien in whole blood would be multiplied by a number between 0.6 and 1.2 to be converted into the amount of Ambien in plasma or serum. N.T. at 48.

Appellant argues that only a conversion factor that is accepted by the scientific community may be used. The Commonwealth argues that this issue was waived for failure to make a timely objection. Commonwealth's Brief at 9. Appellant asserts that Dr. Barbieri's flawed conversion factor was unknown until Dr. Guzzardi testified that there was no consensus on an appropriate conversion factor for Ambien. Thus, before Dr. Guzzardi testified, Appellant was unaware of this basis for objecting to Dr. Barbieri's testimony. Appellant's Brief at 19-21.

The trial court maintains that, in reaching its verdict, it did not consider Dr. Barbieri's testimony concerning dosages and the conversion factors. Instead, it focused upon the undisputed presence of the Ambien in Appellant's blood and the testimony of the officers about Appellant's driving

and condition. T.C.O. at 8. Indeed, the trial court noted during the trial that it had concerns about the conversion factor. N.T. at 109.

A litigant may challenge scientific evidence under the ***Frye*** test.[7] Under ***Frye*** and its progeny, a party must show that the principles and methodology used by an expert witness are generally accepted by the scientific community before the conclusions reached by those methods may be introduced. ***See Betz v. Pneumo Abex, LLC***, 44 A.3d 27 (Pa. 2012); ***Commonwealth v. Topa***, 369 A.2d 1277 (Pa. 1977). A ***Frye*** objection may be waived if not timely made. ***Tucker v. Community Med. Center***, 833 A.2d 217, 223 (Pa. Super. 2003) (holding that a ***Frye*** objection made the day after the expert testimony in question was untimely and therefore waived on appeal).

Here, when Dr. Barbieri testified, Appellant did not object. Instead, Appellant waited until after the redirect examination of Dr. Guzzardi. N.T. at 105. Appellant explains that this delay arose because he was unaware of the conversion issue until Dr. Guzzardi testified. However, in his testimony, Dr. Barbieri made clear that the references in the literature were for serum or plasma and not for whole blood. He testified that he made an assumption that whole blood was equal to serum, or within a certain range of conversion factors, but that there was no way to know if that was a true assumption.

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[7] ***Frye v. U.S.***, 293 F. 1013 (D.C. Cir. 1923).

N.T. at 47-48. Appellant cross-examined Dr. Barbieri on the whole blood versus serum issue and on the conversion factor issue. N.T. at 55-57. Dr. Barbieri clearly stated that he did not know the conversion factor. N.T. at 56. It was apparent at that time, if not earlier, that there was or could be a ***Frye*** issue with the testimony. At that point, a ***Frye*** objection should have been made. Appellant's delay cannot be excused. Consequently, this issue is waived on appeal.

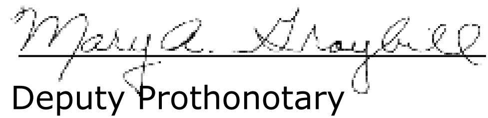
Even had Appellant's objection not been waived, the admission of Dr. Barbieri's testimony would still be subject to a harmless error analysis. ***Cummins v. Rosa***, 846 A.2d 148, 150 (Pa. Super. 2004). An evidentiary ruling must not only be erroneous; it must also be harmful. ***Id.*** An evidentiary ruling that does not affect the verdict will not be disturbed. ***Id.*** Here, Appellant cannot show that Dr. Barbieri's testimony about the conversion factor affected the verdict. The trial court averred that it did not consider that testimony in rendering its verdict, both at the time of the verdict, N.T. at 109-110, and in its opinion, T.C.O. at 8. We have no reason to doubt the trial court's statements. If the objection had not been waived, any error would have been harmless.

Last, Appellant contends that the trial court should have credited Dr. Guzzardi's testimony regarding "sleep driving." Appellant's Brief at 21-24. An argument that the trial court, serving as fact-finder, should have credited one witness' testimony over another is an argument about the weight of the evidence. ***Commonwealth v. Gibbs***, 981 A.2d 274, 281-82 (Pa. Super.

2009). As noted *supra*, Appellant did not preserve a weight of the evidence challenge. This argument is waived.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.



Deputy Prothonotary

Date: 5/22/2013