

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF |
| | : | PENNSYLVANIA |
| Appellee | : | |
| | : | |
| v. | : | |
| | : | |
| STERLING R. PETERSON, | : | |
| | : | |
| Appellant | : | No. 3078 EDA 2012 |

Appeal from the Judgment of Sentence September 28, 2012,
in the Court of Common Pleas of Philadelphia County,
Criminal Division at No. CP-51-CR-0002390-2012

BEFORE: DONOHUE, WECHT and STRASSBURGER*, JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED OCTOBER 24, 2013**

Sterling R. Peterson (Appellant) appeals from the judgment of sentence of 72 hours to six months of imprisonment and a 12 month license suspension following his conviction for driving under the influence (DUI).¹ Upon review, we affirm.

On November 22, 2010 at 3:30 a.m., Sherie Lyttleton was driving in Philadelphia on her way to work. She was traveling on the correct side of the road, and when she came around a bend, she saw a car coming straight at her car traveling on the wrong side of the road. That car, driven by Appellant, hit her.

Officer Katy Lankford responded to the accident scene. Officer Lankford testified that Appellant did not have any visible injuries. Officer

¹ 75 Pa.C.S. § 3802(d)(1).

Lankford further testified that Appellant “wasn’t aware of what was going on[;]” “didn’t know where he was[;]” “couldn’t answer questions[;]” “couldn’t tell [Officer Lankford] where he was coming from [or] which direction he was going[;]” and “had an unsteady gait[.]” N.T., 9/28/2012, at 11. Officer Lankford also testified that Appellant emanated an odor consistent with PCP² and, based on professional experience, believed Appellant was under its influence. *Id.* at 13-14.

Appellant was arrested and charged with violating 75 Pa.C.S. § 3802(d)(1) and (d)(2). On November 8, 2011, he was found guilty of both in the Philadelphia Municipal Court. He then appealed for a trial *de novo* in the Court of Common Pleas. On September 28, 2012, he was tried in a non-jury trial and convicted of violating 75 Pa.C.S. § 3802(d)(1). On the same day, he was sentenced as outlined above.

Appellant filed a timely notice of appeal to this Court. Both Appellant and the trial court have satisfied the provisions of Pa.R.A.P. 1925.³

² PCP is an abbreviation for phencyclidine, a Schedule II controlled substance. *See* 28 Pa. Code § 25.72(c)(5)(i).

³ On November 1, 2012, Appellant was directed to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925 within 21 days. Appellant filed a timely request for extension of time in which to file his concise statement as he was waiting on transcription of notes of testimony. On November 27, 2012, Appellant was granted a 14 day extension to file his concise statement. The notes of testimony became available on December 6, 2012, but Appellant did not file his concise statement until December 31, 2012. Furthermore, Appellant did not serve a copy of his concise statement on the trial court. (footnote continued on next page)

On appeal, Appellant presents two issues for our review.

1. Was the evidence sufficient to convict Appellant of driving under the influence of a controlled substance per 75 Pa.C.S.A. 3802 (d)(1) where the evidence failed to establish beyond a reasonable doubt that Appellant contained any amount of a controlled substance or metabolite in his blood?
2. Was the evidence sufficient to convict Appellant pursuant to 75 Pa.C.S.A. 3802 (d)(2) where the evidence failed to establish Appellant was under the influence of a drug that impaired his ability to safely drive, operate or be in actual control of the movement of a motor vehicle?

Appellant's Brief at 2.⁴

On appeal, Appellant contends that the evidence was insufficient to support his conviction because the Commonwealth "failed to introduce any scientific evidence that Appellant contained any amount of a controlled

On April 11, 2012, the trial court issued an opinion concluding that Appellant had waived his issues on appeal. Trial Court Opinion, 4/11/2012, at 3. The opinion went on to state that even if Appellant had not waived his issues, the only issue available to him, the sufficiency of the evidence to convict him, was without merit. *Id.* at 3-5. On April 23, 2012, the trial court filed a supplemental opinion stating that this Court should consider Appellant's claim on its merits as Appellant served his concise statement on December 31, 2012, and the trial court did address the issues on the merits. We agree with the trial court that Appellant has not waived his issues for his failure to file a timely concise statement. *See Commonwealth v. Thompson*, 39 A.3d 335, 340 (Pa. Super. 2012) ("When counsel has filed an untimely Rule 1925(b) statement and the trial court has addressed those issues we need not remand [for an opinion pursuant to Pa.R.A.P. 1925(c)(3)] and may address the merits of the issues presented.").

⁴ With respect Appellant's second issue, where he challenges his conviction pursuant to 75 Pa.C.S. § 3802(d)(2), which is the portion of the DUI statute that deals with general impairment related to controlled substances, we observe that he was not convicted under this portion of the statute, and therefore do not address this issue.

substance in his blood at the time of the incident leading to his arrest.”
Appellant’s Brief at 5.

As Appellant’s issue concerns the sufficiency of the evidence to convict him, we set forth our well-settled standard of review as follows.

As a general matter, our standard of review of sufficiency claims requires that we evaluate the record in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Nevertheless, the Commonwealth need not establish guilt to a mathematical certainty, and may sustain its burden by means of wholly circumstantial evidence. Significantly, we may not substitute our judgment for that of the factfinder; if the record contains support for the convictions they may not be disturbed. So long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant's crimes beyond a reasonable doubt, his convictions will be upheld. Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. DiPanfilo, 993 A.2d 1262, 1264 (Pa. Super. 2010).

The relevant portions of the state provide as follows.

(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:

(1) There is in the individual's blood any amount of a:

(i) Schedule I controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act;

(ii) Schedule II or Schedule III controlled substance, as defined in The Controlled Substance, Drug, Device and Cosmetic Act, which has not been medically prescribed for the individual; or

(iii) metabolite of a substance under subparagraph (i) or (ii).

(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. § 3802(d)(1) and (2).

The trial court concluded that Appellant was guilty of violating section 3802(d)(1) because based on Officer Lankford's experience, "she believed that Appellant was under the influence of PCP. ... Therefore, based on the combination of this direct and circumstantial evidence, there was sufficient evidence for [the trial court] to conclude beyond a reasonable doubt that Appellant was driving under the influence." Trial Court Opinion, 4/11/2013, at 4-5. We agree.

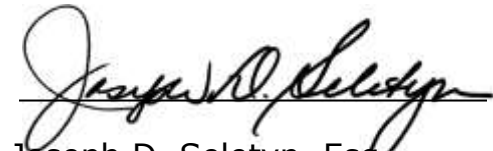
Instantly, Officer Lankford testified that Appellant had an "unsteady gait" and was "swaying back and forth on his feet." Additionally, his words were slurred, he seemed disoriented, and had watery, unfocused eyes. Officer Lankford detected a chemical odor emanating from Appellant that based on her experienced she knew to be PCP. In fact, she described her certainty that Appellant's odor was PCP as being a "10" on a scale of 1 to 10. **See** N.T., 9/28/2012, at 11-13. The trial court found Officer Lankford's

testimony credible. Trial Court Opinion, 4/11/2013, at 4. "The fact-finder bears the responsibility to resolve questions of credibility, and, absent extraordinary circumstances, an appellate court will not substitute its judgment for that of the fact[-]finder." ***Commonwealth v. Blackham***, 909 A.2d 315, 319 (Pa. Super. 2006) (internal quotation omitted).

Accordingly, the circumstantial evidence, as believed by the trial court, demonstrates beyond a reasonable doubt that Appellant had PCP in his blood at the time of the accident. Therefore, the evidence was sufficient to convict him pursuant to 75 Pa.C.S. § 3802(d)(1)(ii).

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/24/2013