NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JEFFREY DERELL HOFFMASTER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 861 MDA 2013

Appeal from the Judgment of Sentence entered December 19, 2012,
in the Court of Common Pleas of Lebanon County,
Criminal Division, at No(s): CP-38-CR-0000620-2012

BEFORE: ALLEN, LAZARUS, and FITZGERALD*, JJ.

MEMORANDUM BY ALLEN, J.: **FILED DECEMBER 19, 2013**

Jeffrey Derell Hoffmaster ("Appellant") appeals from the judgment of sentence imposed after the trial court convicted him of one count of driving under the influence of alcohol pursuant to 75 Pa.C.S.A. § 3802(a)(1).

Appellant does not dispute the following facts:

> On March 10, 2012, Trooper Norbert J. Brennan, of the Pennsylvania State Police, encountered [Appellant's] vehicle parked along the side of State road 72 while on patrol. Trooper Brennan parked his patrol vehicle behind [Appellant's] vehicle and immediately activated his overhead emergency lights. An individual, later identified as [Appellant], jumped out of the vehicle and began to walk back towards the patrol vehicle. Trooper Brennan instructed [Appellant] to get back into his vehicle as he approached [Appellant]. As he approached the vehicle, Trooper Brennan heard [Appellant] state the vehicle had either broken down and/or run out of gas. [Appellant] then turned the key in the ignition and attempted to start the vehicle; however it would not start. Trooper Brennan then noticed the

*Former Justice specially assigned to the Superior Court.

> strong odor of an alcoholic beverage and observed half a case of Keystone Light Beer cans and an open can on the passenger side floor of the vehicle. Trooper Brennan observed [Appellant's] eyes to be bloodshot and glassy, he was having difficulty keeping his balance, his speech was slurred and his movements were slow. [Appellant] was asked to perform field sobriety tests, but was then stopped after the Trooper became concerned for [Appellant's] safety. [Appellant] was then arrested for suspicion of DUI and taken to the Good Samaritan Hospital for blood testing.

Trial Court Opinion, 4/18/13, at 3.

Appellant was tried and convicted before the trial court based on the trial court's inference that Appellant had driven the vehicle while under the influence of alcohol, and prior to the vehicle becoming inoperable. After sentencing and the denial of his post-sentence motion, Appellant filed this timely appeal. Both Appellant and the trial court have complied with Pa.R.A.P. 1925(b). Appellant presents one issue for our review:

> DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT TWO – DUI: GENERAL IMPAIRMENT 75 Pa. Cons. Stat. Ann. § 3802(a)(1) (West) WHERE THE COMMONWEALTH'S EVIDENCE FAILED TO ESTABLISH THAT APPELLANT WAS UNDER THE INFLUENCE OF ALCOHOL TO A DEGREE WHICH IMPAIRED HIS ABILITY TO SAFELY DRIVE, OPERATE, OR BE IN ACTUAL PHYSICAL CONTROL OF A VEHICLE AT THE TIME HE LAST DID SO?

Appellant's Brief at 6.

Appellant challenges the sufficiency of the evidence. Our standard of review is well settled:

> The standard we apply in reviewing the sufficiency of 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 factfinder 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 that of the factfinder. 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 a 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.

Commonwealth v. Bowen, 55 A.3d 1254, 1260 (Pa. Super. 2012) (internal citations omitted).

Appellant was convicted under 75 Pa.C.S.A. § 3802(a)(1), which provides:

> **(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.

Appellant concedes that he was "under the influence of alcohol to a degree which rendered him incapable of safe driving," but bases his sufficiency argument on the assertion that the Commonwealth failed to prove beyond a reasonable doubt that he drove, operated or had actual physical control of the movement of his vehicle while impaired, and the fact

that his vehicle "was never running" when Trooper Brennan found him to be intoxicated. Appellant's Brief at 9-10, 14. We disagree.

As noted above, the Commonwealth may sustain its burden of proving every element of a DUI offense, beyond a reasonable doubt, by means of "wholly circumstantial evidence." ***Bowen, supra***. The trial court in this case inferred that Appellant's "intoxication could not have derived exclusively from the limited amount of beer (one half of one can) that had appeared to be consumed while the car was disabled." Trial Court Opinion, 4/18/13, at 6. The trial court explained at length:

> We find that the Commonwealth provided sufficient evidence that [Appellant] was driving, operating, or controlling a vehicle. "The term "operate" requires evidence of actual physical control of either the machinery or the motor vehicle or the management of the vehicle's movement, but not evidence that the vehicle was in motion." ***Commonwealth v. Brotherson,*** 888 A.2d 901, 904 (Pa. Super. 2005) (quoting ***Commonwealth v. Johnson)***, 883 A.2d 260, 263 (Pa. Super. 2003). Pennsylvania case law indicates that a combination of factors is required when determining whether a person had "actual physical control" of an automobile: "the motor running, the location of the vehicle, and additional evidence showing that the defendant had driven the vehicle." ***Id***. A determination of actual physical control of a vehicle is based upon the totality of the circumstances and can be established through wholly circumstantial evidence. ***Id.*** "In a majority of cases, the suspect location of the vehicle, which supports an inference that it was driven, is a key factor in a finding of actual control. ***Id.*** at 905. In ***Brotherson***, the defendant's car was found parked on a playground basketball court. The car's engine was running and the driver was asleep in the driver's seat. The officer also found an open bottle of malt liquor in the car. The Superior Court found that the evidence in ***Brotherson*** went above and beyond showing that an intoxicated defendant merely started the engine of a parked car. The location of the car indicated that an already intoxicated individual had driven the car to that spot. The

Superior Court also found that it was a reasonable inference that the Appellant's BAC of .118% more than three hours after his arrest could not have derived exclusively from the limited amount of beer available within his car.

Similar to the facts in ***Brotherson***, in the instant case, Trooper Brennan testified that [Appellant] appeared to have consumed a sufficient amount of alcohol to render him incapable of safe driving. Trooper Brennan noticed the strong odor of an alcoholic beverage on [Appellant's] breath. Trooper Brennan observed that [Appellant's] eyes were bloodshot and glassy. [Appellant] was also having difficulty keeping his balance, his speech was slurred, and his movements were slow. While in the vehicle, [Appellant] attempted to turn the ignition of his vehicle. [Appellant] was asked to perform field sobriety tests, but was stopped after the Trooper became concerned for [Appellant's] safety.

[Appellant] also argues that the Commonwealth failed to prove when [Appellant] last drove, operated, or was in actual physical control of the movement of his vehicle. We disagree. The Trooper stated he had driven by the area earlier in his shift and the [Appellant's] vehicle was not there. [Appellant] admitted to Trooper Brennan that he had driven that night. The car could not have stopped where it was without having been driven to that spot. Trooper Brennan observed a half case of Keystone Light Beer cans and an open can on the passenger side floor of the vehicle. [Appellant] admitted he had consumed alcohol after his vehicle had become inoperable. However, Trooper Brennan did not observe any empty cans in or around the car. The Pennsylvania Supreme Court in ***Segida*** [985 A.2d 871 (Pa. Super. 2009)] determined that the [d]efendant had driven while impaired due to a combination of factors including the location of the vehicle and the defendant's extremely high intoxication, coupled with the lack of consumable alcohol on scene. Similar to ***Brotherson*** and ***Segida***, it is a reasonable inference that [Appellant's] intoxication could not have derived exclusively from the limited amount of beer (one half of one can) that had appeared to be consumed while the car was disabled.

It is up to the factfinder to decide who they believe and make a judgment as to what happened. It is within the factfinder's purview to determine the credibility of the witnesses. It is not unreasonable for the fact-finder to believe that [Appellant] consumed enough alcohol prior to his vehicle

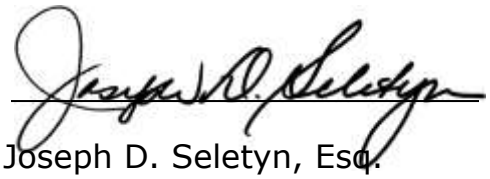
> breaking down to render him incapable of driving. The Court as factfinder could have reasonably determined from the evidence that all of the necessary elements of the crime were established. Therefore, in viewing the evidence in the light most favorable to the Commonwealth, we find that [Appellant's] conviction was supported by sufficient evidence.

Trial Court Opinion, 4/18/13, at 5-7.

We have reviewed the record and conclude that the trial court's analysis is consonant with both the evidence and prevailing law. Given the foregoing, Appellant's sufficiency argument lacks merit. We therefore affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/19/2013