

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Ricky Morales,	:	
	:	
Appellant	:	
	:	
v.	:	No. 1597 C.D. 2014
	:	
	:	
Commonwealth of Pennsylvania,	:	Submitted: February 13, 2015
Department of Transportation,	:	
Bureau of Driver Licensing	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: April 21, 2015**

Ricky Morales (Licensee) appeals from the Order of the Court of Common Pleas of Lebanon County (trial court) dismissing his appeal and reinstating the suspension of his operating privilege imposed by the Department of Transportation, Bureau of Driver Licensing (Department), pursuant to Section 1547(b)(1)<sup>1</sup> of the Vehicle Code for refusing to submit to a chemical test. On

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<sup>1</sup> 75 Pa. C.S. § 1547(b)(1). Section 1547(b)(1) provides, in relevant part:

(1) If any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be

*(Continued...)*

appeal, Licensee argues that the trial court erred when it determined that the arresting officer possessed reasonable grounds to believe that Licensee was in actual physical control of the movement of his vehicle while under the influence of alcohol. Discerning no error, we affirm.

By notice, mailed March 17, 2014, the Department notified Licensee that it was suspending his operating privilege for one year pursuant to Section 1547(b) for refusing a chemical test on March 1, 2014. (Notice of Suspension, R.R. at 9a-11a.) Licensee appealed the suspension and a *de novo* hearing was held before the trial court.

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conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person as follows:

(i) Except as set forth in subparagraph (ii), for a period of 12 months.

Id.

Section 3802(a) of the Vehicle Code provides, in relevant part, as follows:

(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.

75 Pa. C.S. § 3802(a).

During the hearing, the Department presented the testimony of the arresting officer, Stephen Armstrong, who was the only witness to testify. Based on Officer Armstrong's testimony the trial court found as follows.

On March 1, 2014, Officer Armstrong, while on patrol at 3:48 a.m., noticed a vehicle he assumed to be unattended with its engine running but no lights on in a parking lot where it was common for patrons of nearby bars to drive through at night. (Trial Ct. Op. at 2; Hr'g Tr. at 5, R.R. at 17a.) Officer Armstrong approached the vehicle and noticed a single passenger sleeping in the driver's seat with his feet by the pedals and his head lying over on the passenger side. (Trial Ct. Op. at 2.) Officer Armstrong woke the passenger by knocking loudly on the window and yelling. (Trial Ct. Op. at 2.) Upon waking, Licensee "popped up" and turned the key which was already in the ignition of the running car which created a grinding noise. (Trial Ct. Op. at 2.) When asked to confirm his identity, Licensee nodded and said, "A little drunk. A little drunk," at which point Officer Armstrong asked for identification. (Trial Ct. Op. at 2.) Licensee attempted to hand Officer Armstrong his cell phone and money several times before Officer Armstrong asked Licensee to step out of the vehicle and Licensee produced his license. (Trial Ct. Op. at 2.)

Officer Armstrong asked Licensee if and where he had been drinking and Licensee nodded his head in the direction of a nearby bar. (Trial Ct. Op. at 2.) Officer Armstrong could smell alcohol coming from Licensee's body and breath. (Trial Ct. Op. at 2-3.) Officer Armstrong attempted to administer field sobriety tests, but Licensee did not pass because he would not follow Officer Armstrong's

instructions. (Trial Ct. Op. at 2-3.) As a result of the interactions, Officer Armstrong arrested Licensee for suspicion of driving under the influence of alcohol and transported him to a local hospital. (Trial Ct. Op. at 3.)

At the hospital, Officer Armstrong read verbatim the DL-26 consent form containing the implied consent warnings. (Trial Ct. Op. at 3.) Licensee refused to submit to a blood draw test.<sup>2</sup> (Trial Ct. Op. at 3.) Officer Armstrong signed the DL-26 form, but Licensee did not. (Trial Ct. Op. at 3.)

At the conclusion of the hearing, the trial court determined that Officer Armstrong had reasonable grounds to believe that Licensee “was in actual physical control of the movement of [the] motor vehicle” and dismissed Licensee’s appeal.<sup>3</sup> (Hr’g Tr. at 18-19, R.R. at 30a-31a; Amended Order, August 11, 2014.) In its 1925(a) opinion in support of its Order, the trial court found Officer Armstrong’s testimony credible and determined that the totality of the circumstances provided Officer Armstrong with reasonable grounds to believe that Licensee was in physical control of his vehicle while under the influence of alcohol. (Trial Ct. Op. at 7.) The trial court accepted Officer Armstrong’s testimony that Licensee was discovered sleeping in the driver’s seat of his vehicle in a parking lot with the engine running; Licensee attempted to start the vehicle again after being awakened by Officer Armstrong; Licensee smelled of alcohol; and Licensee failed two field

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<sup>2</sup> Licensee did not contest his refusal on appeal to the trial court. (Trial Ct. Op. at 7.)

<sup>3</sup> The trial court initially entered a signed, but incomplete order on July 29, 2014; therefore, an amended order was entered on August 11, 2014 that indicated the disposition of the appeal.

sobriety tests. (Trial Ct. Op. at 7.) Accordingly, the trial court determined these facts were “a reasonable basis on which Officer Armstrong could believe that [Licensee] operated, or was in actual physical control of his vehicle while under the influence of alcohol.” (Trial Ct. Op. at 7.) Licensee now appeals the trial court’s Order to this Court.<sup>4</sup>

On appeal, Licensee argues that the trial court erred when it determined that Officer Armstrong had reasonable grounds to believe that Licensee was in actual physical control of a vehicle while under the influence of alcohol. Licensee analogizes his circumstances to those found in other cases where the licensee was found sleeping in a vehicle, but a court determined the licensee did not have physical control. See Banner v. Department of Transportation, Bureau of Driver Licensing, 737 A.2d 1203, 1204 (Pa. 1999) (licensee was found sleeping in the reclined passenger seat with the keys in the ignition, but the engine was off); Solomon v. Department of Transportation, Bureau of Driver Licensing, 966 A.2d 640, 642 (Pa. Cmwlth. 2009) (licensee was found sleeping in the reclined driver’s seat with the engine running and the vehicle was partially in the traffic lanes). Specifically, Licensee focuses his argument on the premise that Officer Armstrong lacked reasonable grounds because there was no objective evidence that Licensee had driven the vehicle while under the influence of alcohol. Licensee claims that, without evidence that he drove the vehicle while intoxicated, the Department

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<sup>4</sup> “Our standard of review in a license suspension case is to determine whether the trial court’s findings are supported by competent evidence, whether errors of law have been committed, or whether the trial court’s determinations demonstrate a manifest abuse of discretion.” Department of Transportation v. Renwick, 669 A.2d 934, 936 n.2 (Pa. 1996) (citation omitted). “Questions of credibility are for the trial court to resolve.” Banner v. Department of Transportation, Bureau of Driver Licensing, 737 A.2d 1203, 1205 (Pa. 1999).

cannot prove that Licensee was not simply “sleep[ing] it off” in the car. (Licensee’s Br. at 16.)

In response, the Department argues that both Banner and Solomon are distinguishable. The Department asserts that, unlike Banner, there is objective evidence that Licensee exercised actual physical control over the movement of his vehicle while intoxicated. The Department argues further that, unlike Solomon, the arresting officer in the instant case was aware that bar patrons, after leaving a nearby bar, would drive their vehicles through the parking lot where Licensee was parked and not merely park there.

When operating privilege suspensions are under review, the Department must prove that the licensee:

(1) was arrested for driving under the influence by a police officer who had reasonable grounds to believe that the licensee was operating or was in actual physical control of the movement of the vehicle while under [the] influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was warned that refusal might result in a license suspension.

Banner, 737 A.2d at 1206 (citations omitted). The reasonable grounds standard is not a very demanding standard and whether or not the grounds exist is “a question of law reviewable by the court on a case by case basis.” Id. at 1207. Reasonable grounds will be found “when a person in the position of the police officer, viewing the facts and circumstances as they appeared at the time, could have concluded that the motorist was operating, or was in actual physical control of the vehicle” while under the influence of alcohol. Gasper v. Department of Transportation, Bureau of Driver Licensing, 674 A.2d 1200, 1202 (Pa. Cmwlth. 1996). The reasonableness

of the officer's actions will be considered based on the totality of the circumstances and may include "the location of the vehicle, whether the engine was running, and whether there was other evidence indicating that the motorist had driven the vehicle at some point prior to the arrival of the police." Banner, 737 A.2d at 1207.

In Banner, the police discovered the licensee sleeping in the reclined, passenger seat of a vehicle on the side of the road with the engine, ignition, and lights off, but the key in the ignition. Banner, 737 A.2d at 1207. The trial court found that the arresting officer had reasonable grounds to believe that the licensee "had been in control of his vehicle while under the influence of alcohol" and this Court affirmed. Id. at 1204-05. On appeal, the Supreme Court reversed. Based on its review of the relevant cases, the Supreme Court in Banner stated that the court must find "some objective evidence that the motorist exercised control over the movement of the vehicle at the time he was intoxicated" in order for the officer's belief to be found reasonable. Id. The Supreme Court cited the following cases as examples of where there was objective evidence that the licensee was in actual physical control of the vehicle:

In Vinansky v. Department of Transportation, Bureau of Driver Licensing, 665 A.2d 860 (Pa. Cmwlth. 1995), actual physical control was found where the licensee was discovered slumped over the steering wheel of a truck parked in a parking lot behind a fire department social hall. The vehicle's engine was running and its brake lights were on. In Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing v. Paige, . . . 628 A.2d 917 ([Pa. Cmwlth.] 1993), actual physical control was found where the licensee was asleep, slumped over the steering wheel with the key in the ignition. The vehicle was parked on a city street with its parking lights on. The officer in Polinsky v. Commonwealth of Pennsylvania, Department of Transportation, . . . 569 A.2d 425 ([Pa. Cmwlth.] 1990), was found to have had reasonable grounds to believe

that the licensee was in actual physical control of the vehicle when she was found asleep behind the wheel of her vehicle, parked adjacent to a fast food restaurant pick-up window. The headlights of the car were on and the standard transmission was in gear, although the engine was not running. Similarly, actual physical control was found in Commonwealth of Pennsylvania, Department of Transportation, Bureau of Traffic Safety v. Farner, . . . 494 A.2d 513 ([Pa. Cmwlth.] 1985). There, the licensee was found behind the wheel of his truck, parked in a traffic lane with his hands on the steering wheel. The licensee had started the engine and activated the brake lights, but had left the transmission in “park” and did not cause the vehicle to move.

Id. at 1207-08. The Supreme Court distinguished Banner because, “[u]nlike the aforementioned cases, [licensee] was found asleep in the reclined passenger seat with the lights, ignition and engine off. The only evidence tending to establish [licensee’s] control over the vehicle’s movement [was] the location of the car parked safely alongside a rural road near a convenience store.” Id. at 1208. Reasoning that “[a] line must be drawn to distinguish circumstances where a motorist is driving his vehicle while under the influence of alcohol, which the statute is intended to prevent, and circumstances where a motorist is physically present in a motor vehicle after becoming intoxicated,” the Supreme Court concluded that the circumstances presented in Banner demonstrated the latter. Id.

Thus, these cases are heavily dependent on the specific circumstances, including the objective evidence and the credibility determinations made by the trial courts, and we must engage in fact-intensive examination. Examining the facts in Banner as compared to the facts here, there are significant differences. In Banner, the licensee was found sleeping, reclined in the *passenger seat* of his vehicle parked on the side of the road *with the engine, ignition, and lights off*. Banner, 737 A.2d at 1207. A vehicle can neither be driven from the passenger seat



nor while the engine is off. In contrast, here, Licensee was found sleeping in the *driver's seat* of his vehicle, with his feet by the pedals, in a parking lot *with the engine running*.

The facts of this case are more analogous to the facts found credible in Gammer v. Department of Transportation, Bureau of Driver Licensing, 995 A.2d 380 (Pa. Cmwlth. 2010), where the officers discovered the licensee “seated in the driver’s seat but slouched over the passenger seat,” with the car engine running while it was parked in a legal parking space. Id. at 382. In Gammer, the trial court found the arresting officers had reasonable grounds to believe that the licensee was in actual physical control of his vehicle based on licensee’s location in the vehicle and the running engine. Id. at 383. On appeal, we affirmed. We held that “the reasonable grounds test is satisfied when a police officer discovers . . . a motorist slumped over in the driver’s seat of the vehicle with the engine running while the vehicle is parked in a legal parking space in a parking lot.” Id. at 384. Citing Vinansky and Polinsky, similar cases which the Supreme Court had described in Banner, we explained that, “[g]enerally, the motorist’s presence in the driver’s seat of the vehicle with the engine on has been deemed sufficient to satisfy the reasonable grounds test.” Id. at 384. In the present case, Licensee was also found in the driver’s seat, with the engine running, with his feet by the pedals and his head lying over on the passenger side. See also Marone v. Department of Transportation, Bureau of Driver Licensing, 990 A.2d 1187, 1188-89 (Pa. Cmwlth. 2010) (licensee found passed out in driver’s seat of vehicle in parking lot with engine running and lights on); Riley v. Department of Transportation, Bureau of Driver Licensing, 946 A.2d 1115, 1118 (Pa. Cmwlth. 2008) (licensee found

sleeping or passed out in driver's seat of vehicle parked alongside a road with engine running, headlights on, and music blaring). In addition, when awakened by Officer Armstrong, Licensee attempted to start the engine that was already running and he gave Officer Armstrong his cell phone and money instead of his driver's license when asked for identification. Therefore, under the totality of the circumstances, these facts provided Officer Armstrong with reasonable grounds to believe that Licensee was in actual physical control of the vehicle while intoxicated.

Licensee argues that his situation is analogous to Solomon, in which the licensee was found asleep in the reclined driver seat of his car, within walking distance of a bar. Solomon, 966 A.2d at 642. Although the vehicle's engine was running, it was cold and snowing that evening. Id. According to the arresting officer, the vehicle was parked in a traffic lane although people, in Philadelphia "do park there for the club." Id. at 641-42. Based on these facts, the trial court found that the arresting officer did not have reasonable grounds to believe that the licensee was operating or in actual physical control of his vehicle. Id. at 642. On appeal, we affirmed, concluding that the trial court's finding was supported by competent evidence. Id. This Court has previously distinguished Solomon on the basis that the trial court in that case found the testimony credible "that it was common for bar patrons to park in the area, that the engine was running because it was cold and snowy outside, and that the totality of the circumstances showed that the motorist was just 'sleeping off' his intoxication following a night at the bar." Gammer, 995 A.2d at 384 n.4. In Gammer we explained that, "[b]ecause the trial

court had made these findings after considering competent evidence, we affirmed based on our deferential standard of review.” Id.

In Solomon, the trial court found the testimony credible that the engine was running on the licensee’s vehicle because it was cold and snowy outside and that the vehicle was parked in a traffic lane in which it was common for patrons of a nearby club to park. Solomon, 966 A.2d at 641-42. In contrast to Solomon, after considering the competent evidence, the trial court here found Officer Armstrong’s testimony credible that Licensee was in the driver’s seat of the vehicle with the engine running while the vehicle was parked in a parking lot where it was common for patrons of nearby bars to *drive* through, not park, at night. (Trial Ct. Op. at 2; Hr’g Tr. at 5, R.R. at 17a.) Given our standard of review, we must accept the trial court’s credibility determinations. See Gammer, 995 A.2d at 385 (stating that “[q]uestions of credibility are for the trial court to resolve”).

Officer Armstrong’s reasonable belief that Licensee had actual physical control over the vehicle while intoxicated is not diminished by Licensee’s argument that he was only “sleep[ing] it off” in the car. (Licensee’s Br. at 16.) This Court has acknowledged that “[i]t is immaterial whether alternative reasonable explanations for how the motorist came to be as he was found exist.” Gammer, 995 A.2d at 384 (citing Department of Transportation, Bureau of Driver Licensing v. Bird, 578 A.2d 1345, 1348 (Pa. Cmwlth. 1990)). The trial court credited Officer Armstrong’s testimony and his reasonable belief that Licensee had passed out in the vehicle with the engine running and had actual physical control

over the movement of the vehicle. (Trial Ct. Op. at 7.) Therefore, any further explanations for Licensee's actions are immaterial.

Accordingly, based on the credible facts found by the trial court, we conclude that the trial court did not err in finding that Officer Armstrong possessed reasonable grounds to believe that Licensee was in actual physical control of his vehicle while under the influence of alcohol.

For the foregoing reasons, the trial court's Order is affirmed.

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**RENÉE COHN JUBELIRER, Judge**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Ricky Morales,	:	
	:	
Appellant	:	
	:	
v.	:	No. 1597 C.D. 2014
	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing	:	

**ORDER**

**NOW**, April 21, 2015, the Order of the Court of Common Pleas of Lebanon County, entered in the above-captioned matter, is **AFFIRMED**.

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**RENÉE COHN JUBELIRER, Judge**

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ricky Morales, :  
Appellant :  
v. : No. 1597 C.D. 2014  
: Submitted: February 13, 2015  
Commonwealth of Pennsylvania, :  
Department of Transportation, :  
Bureau of Driver Licensing :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION  
BY JUDGE LEAVITT

FILED: April 21, 2015

Respectfully, I dissent. I disagree with the majority's conclusion that the Department offered objective evidence that Licensee exercised control over the movement of his vehicle while he was intoxicated. The arresting officer's own testimony established that Licensee was merely present in a motor vehicle after becoming intoxicated. I also disagree with the majority's analysis insofar as it compares and contrasts the case *sub judice* with prior cases.

In order to suspend a licensee's driving privileges under Section 1547 of the Vehicle Code, 75 Pa. C.S. §1547,<sup>1</sup> commonly known as the Implied Consent

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<sup>1</sup> Section 1547 states, in relevant part:

(a) General rule.--Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the

**(Footnote continued on the next page . . . )**

Law, the Department must establish, *inter alia*, that the licensee “was arrested for driving under the influence by a police officer who had reasonable grounds to believe that the licensee was operating or was in actual physical control of the movement of the vehicle while under [the] influence of alcohol.” *Banner v. Department of Transportation, Bureau of Driver Licensing*, 737 A.2d 1203, 1206 (Pa. 1999). At the very least, “there must be some objective evidence that the motorist exercised control over the movement of the vehicle at the time he was intoxicated.” *Id.* at 1207. Stated otherwise,

[a] line must be drawn to distinguish circumstances where a motorist is driving his vehicle while under the influence of alcohol, which the statute is intended to prevent, and *circumstances where a motorist is physically present in a motor vehicle after becoming intoxicated.*

*Id.* at 1208 (emphasis added).

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**(continued . . . )**

purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle:

(1) in violation of section ... 3802 (relating to driving under influence of alcohol or controlled substance)

\* \* \*

(b) Suspension for refusal.--

(1) If any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person as follows:

(i) Except as set forth in subparagraph (ii), for a period of 12 months.

75 Pa. C.S. §1547.

In this case, there was no objective evidence that Licensee exercised control over the movement of his vehicle while he was intoxicated. Stephen Armstrong, the arresting officer, discovered Licensee asleep, lying on his right side across the bench seat of his pickup truck. Notes of Testimony, July 29, 2014, at 15; Reproduced Record at 27a (R.R. \_\_). Officer Armstrong testified that the vehicle was in park and the exterior lights were off. Although the engine was running, Officer Armstrong testified that it was 8 degrees Fahrenheit on the night in question. N.T. 5; R.R. 17a. Perhaps most relevant to Officer Armstrong's reasonable belief about Licensee's conduct is the officer's own testimony on direct and cross examination:

[Department's Counsel]: So, could you – when you saw [Licensee] in his car did you immediately – what did you think as far as what could have lead [sic] [Licensee] to that parking lot that evening?

[Officer Armstrong]: My initial thought was that he was intoxicated and he had been passed out there since the bar's closing, which was an hour and 48 minutes earlier.

\* \* \*

[Licensee's Counsel]: So, your initial thought was he walked out of the bar, got in his car and perhaps decided to sleep it off or passed out; is that what you were thinking?

[Officer Armstrong]: I don't – I honestly don't think my initial thought was that he was there to sleep it off. I think my initial thought was his intoxication level was so high that he made it to his car, and due to his level of intoxication fell asleep.

N.T. 16-17; R.R. 28a-29a. Regardless of whether Officer Armstrong thought Licensee decided to “sleep it off” or passed out, his testimony is evidence of his belief that Licensee had not moved his vehicle after he became intoxicated. As in



*Banner*, this is a case where the arresting officer's testimony established that Licensee was merely "present in a motor vehicle after becoming intoxicated." *Banner*, 737 A.2d at 1208.

I agree with the majority's observation that license suspension appeals are fact-intensive; however, I disagree with the majority's comparison of the facts of the case *sub judice* to prior cases. More specifically, I do not find *Gammer v. Department of Transportation, Bureau of Driver Licensing*, 995 A.2d 380 (Pa. Cmwlth. 2010), analogous enough to be helpful. In *Gammer*, the officers discovered the licensee's vehicle parked in a motel parking lot with the engine running. The licensee was seated in the driver's seat, slouched over the passenger seat, and appeared to be either unconscious or asleep. The trial court found, and this Court agreed, that the officers had reasonable grounds to believe the licensee was in actual physical control of his vehicle. Notably, however, there were additional significant facts in *Gammer* that are not present here: one of the officers had arrested the licensee twice before for DUI, and the licensee's car was discovered in an unusual location next to dumpsters at the far end of the parking lot, suggesting movement of the vehicle within the lot.

*Solomon v. Department of Transportation, Bureau of Driver Licensing*, 966 A.2d 640 (Pa. Cmwlth. 2009), is factually closer to the instant case. In *Solomon*, the licensee was discovered asleep in the reclined driver's seat of his car at approximately 3:00 a.m. The car was parked in a driving lane within walking distance of a bar. The arresting officer testified that it was common for patrons of the bar to park there. Although the car engine was running it was undisputed that it was cold and snowing that night. Because there was no objective

evidence presented to indicate the licensee had driven the vehicle at any point prior to the arrival of the police, this Court affirmed the trial court's finding that the officers lacked reasonable grounds to believe the licensee was in actual physical control of the movement of his vehicle. The record in the present case suffers from the same lack of objective evidence.

I disagree with the majority's basis for distinguishing *Solomon*, which differs from the trial court's rationale and hinges on an isolated statement by Officer Armstrong at the hearing. In describing the parking lot where Licensee's vehicle was discovered, Officer Armstrong testified that "[i]t's a common parking lot for people who go to the bars, you know, at night, drive through that parking lot." N.T. 5; R.R. 17a. The majority emphasizes this confusingly worded statement as evidence that Licensee must have driven his vehicle while intoxicated. In doing so, the majority implicitly assumes the parking lot is some sort of throughway or shortcut, but there was no such finding by the trial court<sup>2</sup> or evidence to support one. In fact, Officer Armstrong himself testified unequivocally on direct and cross examination that it is common for patrons of nearby bars to *park* in this particular lot at night because it is centrally located and free of charge. *See, e.g.*, N.T. 10-11, 14; R.R. 23a, 26a.<sup>3</sup>

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<sup>2</sup> Notably, the trial court did not cite Officer Armstrong's isolated statement that people "drive through" the parking lot as evidence to support the officer's reasonable belief that Licensee exercised control over the movement of his vehicle. Instead, the trial court cited Licensee's attempt to turn the key in the ignition when he woke up as objective evidence of control. I would reject that evidence as incompetent since a licensee's conduct must be viewed retrospectively, not prospectively, *i.e.*, whether the licensee "*was* operating the vehicle" or "*had driven* the vehicle." *Banner*, 737 A.2d at 1207 (emphasis added).

<sup>3</sup> Officer Armstrong testified as follows on direct examination:

**(Footnote continued on the next page . . . )**

In summary, Officer Armstrong discovered Licensee's pickup truck parked in a lot that the officer described as a common place for patrons of several nearby bars to park at night. It was a frigid winter night and Licensee had the engine running and the lights off. Licensee was lying down on the bench seat either asleep or passed out. Officer Armstrong testified to his belief that Licensee had left one of the nearby bars nearly two hours earlier and had either fallen asleep or passed out in his vehicle. There was no objective evidence that Licensee had operated or exercised physical control over his vehicle while he was intoxicated. Echoing the astute observations of my former colleague, the "reasonable" conclusion to be drawn from the circumstances of this case is that Licensee

had consumed too many alcoholic beverages and, upon leaving the [bar], had had enough sense and wits to realize his own incapacity to drive legally and had remained in his vehicle.

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**(continued . . .)**

[Officer Armstrong]: I believe when I was trying to ask if he had been drinking it appeared to me he was intoxicated or -- that was awhile ago, I might have said where he was drinking at, I believe, and he kind of pointed his head towards the corner bar known as the William Penn, which is less than a hundred yards and within eyesight of the vehicle.

[Department's Counsel]: Was that like a certain explanation for you when he said there when he pointed his head towards the bar?

[Officer Armstrong]: Yeah, I believe that he came from the William Penn. Or there's another bar half a block from there known as Woofer's, the two most common bars *where people park there that attend*.

N.T. 10-11; R.R. 22a-23a (emphasis added). The officer testified on cross examination:

[Licensee's Counsel]: You testified earlier this is a place common where people are *parking*?

[Officer Armstrong]: Yeah, the biggest parking lot in the town area and it's free to park so *the majority of the people park there*.

[Licensee's Counsel]: Are there any bars in that area?

[Officer Armstrong]: Correct, there are five bars within walking distance of there.

N.T. 14; R.R. 26a (emphasis added).

*Vinansky v. Department of Transportation, Bureau of Driver Licensing*, 665 A.2d 860, 864 (Pa. Cmwlth. 1995) (Kelley, J., dissenting).

Accordingly, I would reverse the trial court's order.

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MARY HANNAH LEAVITT, Judge