

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
	:	
v.	:	
	:	
	:	
DAINE LOWER	:	No. 533 WDA 2025

Appeal from the Order Entered April 10, 2025
In the Court of Common Pleas of Allegheny County Criminal Division at
No(s): CP-02-CR-0003825-2024

BEFORE: BOWES, J., OLSON, J., and BENDER, P.J.E.

MEMORANDUM BY OLSON, J.:

FILED: September 4, 2026

Appellant, the Commonwealth of Pennsylvania, appeals from the order entered on April 10, 2025, granting *habeas* relief and dismissing the criminal charges of aggravated assault by vehicle,¹ recklessly endangering another person (REAP),² and reckless driving³ lodged against Daine Lower (Lower). Upon careful consideration, we vacate the trial court's order, reinstate the criminal charges against Lower and remand for further proceedings.

The trial court summarized the facts of this case as follows:

[Lower] is a police officer in Bridgeville Borough, Pennsylvania. On December 21, 2023, he was on patrol [during] the 11[:00] p.m. to 7[:00] a.m. shift. In the early morning hours while making a left turn [in his patrol car], he [] struck a pedestrian, who was crossing the roadway [onto which he turned.] The officer immediately stopped, rendered aid and called for medics to

¹ 75 Pa.C.S.A. § 3732.1(A).

² 18 Pa.C.S.A. § 2705.

³ 75 Pa.C.S.A. § 3736.

respond. [Lower] was ultimately charged with aggravated assault and [REAP]. [Lower] filed a petition for *habeas corpus*, the Commonwealth responded, and a hearing was held. The Commonwealth [entered] the transcript of the preliminary hearing and [the police car] dash[board] cam[era] video of the incident [into the certified record]. The trial court reviewed these materials, along with the case law cited by defense counsel. The trial court granted relief, dismissing [both charges]. The [trial] court noted that [Lower] was not intoxicated at the time of the accident [and he was driving at] 29 [miles per hour which was] below the posted speed. [Lower] was not using his cell[ular tele]phone or any other device at the time he struck the pedestrian. Further, [the trial court concluded Lower] immediately activated his brakes when he saw the victim crossing the roadway.

[The trial court also determined that] this accident occurred in the early morning hours on a very dark portion of the roadway that curved to the left. The pedestrian who was struck, had a blood alcohol level of .32 at the time of the accident and was in possession of a bottle of vodka.

The [trial] court did not believe that under the circumstances, the Commonwealth had established that [Lower] acted recklessly or with gross negligence [as statutorily required for the charged offenses.]

Trial Court Opinion, 8/27/2025, at 1-2 (unnecessary capitalization omitted).

On April 10, 2025, the trial court filed findings of fact, conclusions of law, and an order granting Lower *habeas* relief and dismissing the aforementioned charges lodged against him.⁴ On April 17, 2025, the

⁴ The Commonwealth also charged Lower with the summary offenses of failure to keep right, image display device, and failure to yield right of way to pedestrian. 75 Pa.C.S.A. §§ 3301, 4527, and 3542, respectively. Those charges were not dismissed and are still currently pending against Lower.

Commonwealth filed a motion for reconsideration, which the trial court denied by order entered on May 5, 2025. This timely appeal resulted.⁵

On appeal, the Commonwealth presents the following issues for our review:

- I. Whether the trial court erred in granting the petition for *habeas corpus* where the Commonwealth presented sufficient evidence that [Lower] acted with the requisite *mens rea* in the operation of his motor vehicle when he struck the victim?
- II. Whether the trial court's finding that [Lower] immediately activated his brakes upon seeing the victim crossing the roadway is unsupported by the record?

Commonwealth's Brief at 4.⁶

The Commonwealth contends that the trial court erred when it granted *habeas* relief and dismissed the charges of aggravated assault, REAP, and reckless driving against Lower. ***Id.*** at 11-19. More specifically, the Commonwealth challenges the trial court's conclusion that it failed to present *prima facie* evidence that Lower acted recklessly or with gross negligence,

⁵ On May 5, 2025, the Commonwealth filed a notice of appeal and concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on August 27, 2025.

⁶ Although presented as two separate issues, the Commonwealth argues both claims in a single argument section of its brief. **See** Commonwealth's Brief at 4 and 11-19. As such, we will examine both issues in a single discussion that addresses whether the Commonwealth came forward with *prima facie* evidence of *mens rea* or that Lower acted recklessly or with gross negligence. We need not address the sufficiency of the evidence as it pertains to other elements of the charged offenses.

instead finding that he “immediately activated his brakes upon seeing the victim crossing the roadway and [that he] was not using a cell[ular tele]phone immediately prior to striking the victim.” **Id.** at 11. The Commonwealth submits that it made a *prima facie* showing that would allow the case to be bound over for trial because it produced evidence of each of the material elements of the crimes charged, Lower was the one who committed them, and the direct and circumstantial evidence presented should have been considered in the light most favorable to the Commonwealth. **Id.** at 12. The Commonwealth argues that if its evidence were presented at trial and accepted as true, the trial court would be compelled to allow this case to proceed to a jury. **Id.** The Commonwealth asserts that it produced *prima facie* evidence of recklessness, or a conscious disregard of an unjustifiable risk, as required to support each of the crimes charged herein (aggravated assault by vehicle, REAP, and reckless driving). **Id.** at 13-16. In sum, the Commonwealth maintains:

A person acts recklessly with respect to the material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature that, considering the nature and intent of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor’s situation. Viewing the evidence in the light most favorable to the Commonwealth, the record here discloses that [Lower] was on patrol in his police cruiser when he struck the victim as she was crossing the street in a crosswalk. [Lower] was making a left-hand turn when he struck the victim despite the fact that she was clearly visible before he even began to make his turn, and struck her in the oncoming lane of travel.

Minutes prior to impact, [Lower's] body worn video and dash[board] cam[era] video established that [Lower] had been watching a video on his cell[ular tele]phone while operating the police cruiser [which amounted to] a gross departure from the standard of care because it [was] a conscious disregard of a substantial and unjustifiable risk. This is a question of fact to be decided by a jury.

Id. at 10. Moreover, the Commonwealth acknowledges that "the trial court [was] correct" that Lower "was not speeding" while making a left-hand turn or at the moment of impact, however, it challenges the trial court's "finding that [Lower] was not watching his cell[ular tele]phone and that he applied the brakes upon seeing the victim[.]" **Id.** at 17. Instead, the Commonwealth posits that the victim was clearly visible but Lower was looking at his cellular telephone and "cut his turn short and was driving in the oncoming lane and not on the right side of the road, the proper lane of travel," when "he struck the victim after she had passed the midpoint of the roadway and had nearly completed her crossing." **Id.** at 18. As such, the Commonwealth asks us to reverse the order granting *habeas* relief and reinstate Lower's criminal charges. **Id.** at 20.

"In reviewing a trial court's order granting a defendant's petition for writ of *habeas corpus*, we must generally consider whether the record supports the trial court's findings, and whether the inferences and legal conclusions drawn from those findings are free from error." **Commonwealth v. Hilliard**, 172 A.3d 5, 10 (Pa. Super. 2017) (internal citation omitted). "A trial court may grant a defendant's petition for writ of *habeas corpus* after a preliminary

hearing where the Commonwealth has failed to present a *prima facie* case against the defendant.” ***Id.*** (internal citation and brackets omitted).

This Court has previously stated:

It is settled that the evidentiary sufficiency, or lack thereof, of the Commonwealth's *prima facie* case for a charged crime is a question of law as to which an appellate court's review is plenary. The trial court is afforded no discretion in ascertaining whether, as a matter of law and in light of the facts presented to it, the Commonwealth has carried its pre-trial *prima facie* burden to make out the elements of a charged crime. Therefore, we are not bound by the legal determinations of the trial court.^[7]

With respect to preliminary hearings, this Court has explained the purpose of the hearing is:

... [t]o determine whether the Commonwealth has made out a *prima facie* case for the offenses charged. A *prima facie* case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime.....

The Commonwealth establishes a *prima facie* case when it produces evidence that, ***if accepted as true***, would warrant the trial judge to allow the case to go to a jury. The Commonwealth need not prove the elements of the crime beyond a reasonable doubt; rather, the *prima facie* standard requires evidence of the existence of each and every element of the crime charged. Moreover, ***the weight and credibility of the evidence are not factors*** at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense. Inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case.

⁷ “Furthermore, our scope of review is limited to determining whether the Commonwealth has established a *prima facie* case.” ***Hilliard***, 172 A.3d at 12.

Commonwealth v. Jones, 339 A.3d 493, 498 (Pa. Super. 2025) (internal citations and quotations omitted; emphasis, brackets, and ellipses in original; footnote added). “[T]he Commonwealth can establish a *prima facie* case by wholly circumstantial evidence.” ***Commonwealth v. Starry***, 196 A.3d 649, 653 (Pa. Super. 2018), *affirmed*, 224 A.3d 312 (Pa. 2020). Ultimately, “[a] judge at a preliminary hearing is not required, nor is he authorized to determine the guilt or innocence of an accused; his sole function is to determine whether probable cause exists to require an accused to stand trial on the charges contained in the complaint.” ***Commonwealth v. Black***, 323 A.3d 860, 865 (Pa Super. 2024) (citation omitted).

As mentioned, the Commonwealth charged Lower with aggravated assault by vehicle, REAP, and reckless driving. The Motor Vehicle Code provides, as follows:

§ 3732.1. Aggravated assault by vehicle

(a) Offense. -- Any person who recklessly or with gross negligence causes serious bodily injury to another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic, except section 3802 (relating to driving under influence of alcohol or controlled substance), is guilty of aggravated assault by vehicle, a felony of the third degree when the violation is the cause of the injury.

75 Pa.C.S.A. § 3732.1(a). “Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.” 75 Pa.C.S.A. § 3736(a).

REAP is statutorily defined as:

§ 2705. Recklessly endangering another person

A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

18 Pa.C.S.A. § 2705.

The Crimes Code defines the culpability for recklessness as follows:

A person acts recklessly with respect to a material element of an offense when he ***consciously disregards a substantial and unjustifiable risk*** that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves ***a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.***

18 Pa.C.S.A. § 302(b)(3)(emphasis added).

Moreover, “[o]ur courts have clarified that the ‘concept of gross negligence is encompassed within the concept of recklessness as set forth in Section 302(b)(3).’” ***Black***, 323 A.3d at 869, citing ***Commonwealth v. Karner***, 193 A.3d 986, 992 (Pa. Super. 2018) and ***Commonwealth v. Huggins***, 836 A.2d 862, 868 (Pa. 2003) (generally indicating that “grossly negligent” is an equivalent state of mind to “recklessness”). The “conscious disregard” of a risk requires the Commonwealth to show that a defendant was “aware of the risk and then chose to proceed in spite of the risk.” ***Commonwealth v. Kling***, 351 A.3d 1274, 1287 (Pa. Super. 2026) (citation omitted). “[T]o be guilty of reckless driving, a person must be aware that there exists a substantial risk that injury will result from his driving and yet continue to drive in such a manner, thus callously disregarding the risk created

by his own reckless driving.” **Id.** at 532. However, this Court has also held that “a motor vehicle code violation, without more,” is not “recklessness *per se*[.]” **Commonwealth v. Karner**, 193 A.3d 986, 993 (Pa. Super. 2018), citing **Commonwealth v. Bullick**, 830 A.2d 998, 1003-1004 (Pa. Super. 2003) (stating: “What is material is actual reckless driving or conduct...for it is this conduct which creates the peril in question”). Instead, “other tangible indica of unsafe driving” may establish a conscious disregard of a substantial risk of harm. **Kling**, 351 A.3d at 1288 (internal citation omitted).

In prior cases, this Court has identified specific examples of conduct that demonstrate a disregard of known driving risks and, therefore, constitute reckless operation of a motor vehicle:

[T]his Court has held that driving in the opposite lane of traffic may sufficiently establish the *mens rea* of recklessness. In **Commonwealth v. Smoker**, 203 A.2d 358, 360 (Pa. Super. 1964), this Court determined that the jury was justified in inferring that the defendant acted recklessly when he drove on the wrong side of the road without any visible reason or compulsion to do so and caused a deadly head-on collision. This Court noted that “[n]othing appeared in the evidence to show that he was forced off the road, that he was faced with a sudden emergency or that any other fact existed which might have relieved him of responsibility.” **Id.**; **see also Commonwealth v. Setsodi**, 450 A.2d 29, 32 (Pa. Super. 1982) (finding that defendant's failure to observe approaching vehicles in opposing lane of traffic before making a left turn into a private driveway may have constituted recklessness or criminal negligence in supporting a *prima facie* case of involuntary manslaughter).

We also note that a defendant's failure to apply the brakes of his vehicle or to attempt to avoid an accident is an additional factor [that supports] an inference of recklessness. This Court has concluded that “a motorist's conduct is more egregious if he does not apply his brakes or attempt to slow down before a collision

than if he attempts to stop.” ***Commonwealth v. Miller***, 955 A.2d 419, 423 (Pa. Super. 2008), *citing* ***Commonwealth v. Dellavecchia***, 725 A.2d 186, 189 (Pa. Super. 1998).

Black, 323 A.3d at 869.

We must examine each of the trial court’s determinations in light of the legal standards and precedents set forth above. In this case, the trial court first found that the accident “occurred in the early morning hours on a very dark portion of the roadway that curved left.” Trial Court Opinion, 8/27/2025, at 1-2. Viewing the evidence in the light most favorable to the Commonwealth as required, more specifically, video surveillance from both the police cruiser dashboard camera, as well as Lower’s body camera, we note the following. While it is true that it was nighttime, dashboard camera footage shows Lower was driving on Bower Hill Road in Bridgeville, Pennsylvania through a commercial district with lights from various businesses, an illuminated railroad crossing, and multiple streetlights. In the video from the dashboard camera, the victim can be seen on the left side of Bower Hill Road, from approximately one block away, already crossing the street. Dashboard Camera Video, 12/21/2023, at 50:37. At the time she was struck, the victim is seen crossing a no-outlet street, perpendicular to Bower Hill Road. ***Id.*** at 50:44. We agree with the trial court that the video evidence shows Lower was driving 29 miles per hour (m.p.h.), which was below the posted speed limit of 35 m.p.h. for Bower Hill Road. ***Id., see also*** Trial Court Opinion, 8/27/2025, at 2. As mentioned, however, Lower was turning left onto a secondary, no-outlet road which had a posted speed-limit that was seen on the video but difficult to read

and may have been lower than 35 m.p.h. **See** Dashboard Camera Video, 12/21/2023, at 50:44.

Moreover, upon further review of the dashboard camera footage, the victim had almost fully crossed the street at the moment of impact. **Id.** at 50:40. When executing the left turn, the police cruiser is seen entering the opposing lane of travel near the left-side curbline, cutting directly in front of the pedestrian and striking her. **Id.** at 50:37-50:43. Driving in the opposite lane of traffic may establish the *mens rea* of recklessness. **See Black supra.** The trial court failed to address this evidence in its opinion.

Furthermore, we reject the trial court's reliance on the fact that the pedestrian "had a blood alcohol level of .32 at the time of the accident, and was in possession of a bottle of vodka." **See** Trial Court Opinion, 8/27/2025, at 2. Upon review of the dashboard camera footage, the victim is clearly walking at an even pace in the center of the crosswalk and does not appear to be swaying or stumbling. Dashboard Camera Video, 12/21/2023, at 50:37-50:43. She appears to hesitate briefly and look directly at the police cruiser in apparent shock and disbelief in the seconds before impact. **Id.** There was no evidence presented that the victim's actions or intoxication played a part in the accident as suggested by the trial court.⁸

⁸ To be clear, there is no dispute that the victim was intoxicated. However, at this stage of the prosecution and under our standard of review, given that she was not staggering, stumbling, or dashing into the street, her inebriation does not appear to have contributed to the accident. Moreover, her state of
(Footnote Continued Next Page)

Furthermore, the trial court determined that Lower “immediately activated his brakes when he saw the victim crossing the roadway.” Trial Court Opinion, 8/27/2025, at 2. Upon review of the dashboard camera footage, the brakes on the police cruiser were momentarily activated when initiating the left-hand turn across the opposing lane of travel on Bower Hill Road. Dashboard Camera Video, 12/21/2023, at 50:39-50:42. The brakes were subsequently released close in time to the moment of impact and then reapplied to stop the vehicle and render aid. ***Id.*** at 50:42-50:44. There were no other apparent actions in an attempt to avoid the accident, like swerving or sudden turning.

Finally, the trial court found that Lower “was not using his cell[ular tele]phone or any other device at the time he struck the pedestrian.” Trial Court Opinion, 8/27/2025, at 2. As the Commonwealth contends, body camera footage recorded approximately 10 minutes before the accident shows Lower driving while holding his cellular telephone in his right hand, positioned just slightly below the dashboard, and videos are visibly playing. ***See*** Commonwealth’s Brief at 16; ***see also*** Body Camera Video, 12/21/2023, at 39:20-41:13. Lower stops briefly for an unrelated emergency call and gets out of his police cruiser momentarily. When he gets back into his police car, Lower can be seen transferring his cellular telephone from his right hand to

mind is not exculpatory and does not detract from the Commonwealth’s *prima facie* showing. At trial, however, defense counsel can certainly argue, and a fact-finder may determine, that the victim’s inebriation played some role in this incident.

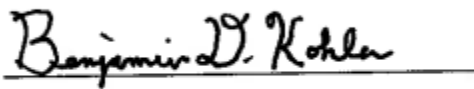
his left hand, until it is moved downward to the left and out of frame. Body Camera Video, 12/21/2023, at 47:57-48:04. Lower's illuminated cellular telephone briefly becomes visible again on Lower's left-side, two minutes before the accident. ***Id.*** at 48:15-48:17. At the point of impact, while both of Lower's hands appear to be on the steering wheel, a brief glint of the cellular telephone can be seen again on Lower's left side as he is getting out of the police cruiser. ***Id.*** at 50:44. Lower is holding the cellular telephone in his left-hand as he exits the vehicle. ***Id.*** at 50:48. He transfers the cellular telephone into his right hand, as he crosses in front of the police cruiser, and places it in his right pocket as he reaches the victim lying in the street. ***Id.*** at 50:49-50:51; ***see also*** Dashboard Camera Video, 12/21/2023, at 50:50-50:53. Although we agree with the trial court that there was no direct evidence that Lower viewed or actively manipulated his mobile telephone at the time of the accident (because the device was often out of view of the video footage), without dispute Lower had clearly been watching videos while driving on patrol approximately 10 minutes prior. The Commonwealth also presented additional evidence that Lower had his cellular telephone on or near his person at the moment of impact.

Taken altogether, when the evidence is viewed in the light most favorable to the Commonwealth, the reasonable inferences to be drawn from the record support guilty verdicts on the charged offenses. Hence, in light of our standard of review and applicable law, we conclude the Commonwealth presented *prima facie* evidence to support the charges lodged against Lower.

If accepted as true, the evidence presented by the Commonwealth showed recklessness -- indica of unsafe driving, a substantial and unjustifiable risk, and a deviation from standard, reasonable conduct. As such, the case should go to trial. Ultimately, however, it is for the fact-finder to determine if Lower operated his cruiser while distracted by his cellular telephone or whether he engaged in some other form of reckless driving. At this stage in the proceedings, however, the weight and credibility of the evidence are not factors to be considered. Accordingly, for all of the foregoing reasons, we conclude that the trial court erred by granting *habeas* relief. Hence, we vacate and reverse the trial court's order and remand for further proceedings.

Order vacated. Charges reinstated. Case remanded. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

9/4/2026

