NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
LORA MARIE FRANCIS	:	
Appellant	:	No. 3051 EDA 2025

Appeal from the Judgment of Sentence Entered October 29, 2025
In the Court of Common Pleas of Northampton County Criminal Division
at No(s): CP-48-CR-0000495-2025

BEFORE: McLAUGHLIN, J., KING, J., and BECK, J.

MEMORANDUM BY BECK, J.: **FILED NOVEMBER 18, 2026**

Lora Marie Francis ("Francis") appeals from the judgment of sentence entered by the Northampton County Court of Common Pleas ("trial court") following her guilty plea to driving under the influence of alcohol or a controlled substance ("DUI") – highest rate of alcohol, accidents involving damage to an attended vehicle or property, and driving while operating privilege is suspended or revoked.[1] On appeal, Francis argues that the trial court erred by treating her prior conviction for DUI in West Virginia as a prior offense and treating the instant conviction as her fourth or more in ten years for grading and sentencing purposes. After careful consideration, we conclude that the

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[1] 75 Pa.C.S. §§ 3802(c), 3743(a), 1543(b)(1)(iii).

West Virginia statute is "substantially similar" to Pennsylvania's DUI statute. We therefore affirm Francis' judgment of sentence.

Based upon the claim raised for our review, a full recitation of the facts underlying Francis' conviction is unnecessary. It is sufficient to say that on the night of August 11, 2024, Francis was driving with a blood alcohol content ("BAC") of .164%, during which she struck and damaged a pickup truck.

The Commonwealth charged Francis with DUI – highest rate of alcohol and numerous related offenses. Her DUI – highest rate of alcohol charge under section 3802(c) was graded as a second-degree felony as her fourth offense in the last ten years based upon her two prior convictions of DUI in Centre County, Pennsylvania and a 2017 conviction of DUI in West Virginia under W. Va. Code § 17C-5-2(e) (2016).[2] Pertinent to this appeal, an individual who violates section 3802(c) and has three or more prior DUI offenses commits a second-degree felony and is subject to enhanced penalties under Pennsylvania's graduated sentencing scheme for repeat offenders. ***See*** 75 Pa.C.S. §§ 3803(b)(4.1)(ii), 3804(c)(3). Relatedly, section 3806 provides, in pertinent part, as follows:

> **(a) General rule.--**Except as set forth in subsection (b), the term "prior offense" as used in this chapter shall mean any conviction for which judgment of sentence has been imposed, adjudication of delinquency, juvenile consent decree, acceptance of

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[2] The record contains little to no details regarding Francis' three prior DUI convictions, including neither the dates of the offenses nor the convictions. She nonetheless conceded that she committed these past offenses. ***See*** Motion, 4/2/2025, ¶¶ 7-17.

> Accelerated Rehabilitative Disposition or other form of preliminary disposition before the sentencing on the present violation for any of the following:
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> (1) an offense under section 3802 (relating to driving under influence of alcohol or controlled substance);
>
> (2) an offense under former section 3731;
>
> (3) **an offense substantially similar to an offense under paragraph (1) or (2) in another jurisdiction**; or
>
> (4) any combination of the offenses set forth in paragraph (1), (2) or (3).
>
> **(b) Timing.--**
>
> (1) For purposes of … 3804 (relating to penalties) …, the prior offense must have occurred:
>
> (i) within 10 years prior to the date of the offense for which the defendant is being sentenced; or
>
> (ii) on or after the date of the offense for which the defendant is being sentenced.

75 Pa.C.S. § 3806(a), (b)(1) (emphasis added).

On April 2, 2025, Francis filed a motion in which she requested that the trial court declare that her West Virginia DUI conviction did not constitute a prior offense under section 3806. Therein, she contended that W. Va. Code § 17C-5-2(e) (2016) was not substantially similar to Pennsylvania's DUI statute, and she therefore had only two prior DUI offenses for purposes of grading and sentencing. ***See*** Motion, 4/2/2025, ¶¶ 7-17. On June 23, 2025, the trial court denied the motion.

On August 26, 2025, Francis entered a negotiated plea to the above-referenced offenses. On October 29, 2025, the trial court treated Francis' DUI – highest rate of alcohol conviction as her fourth or subsequent offense for grading and sentencing purposes under sections 3803(b)(4.1)(ii), 3804(c)(3), and 3806(a)(3), and (b)(1) of the Vehicle Code and sentenced Francis to twenty to forty months of incarceration on that charge. The court also sentenced her to a concurrent term of six to twelve months of incarceration for driving while her operating privilege was suspended or revoked.

Francis timely appealed to this Court. She presents the following issue for review:

> Did the trial court err as a matter of law and abuse its discretion in determining that the [DUI] offense for which [Francis] was sentenced on October 29, 2025 was a fourth offense within ten years because her prior offense for [DUI] in violation of [W. Va. Code § 17C-5-2(e) (2016)] was not substantially similar to 75 Pa.C.S.[] § 3802(c) and therefore cannot be considered a prior offense under 75 Pa.C.S.[] § 3806?

Francis' Brief at 4.

Francis' claim, challenging the grading of her DUI – highest rate of alcohol conviction, implicates the legality of her sentence. ***Commonwealth v. Dourlain***, 315 A.3d 868, 872 (Pa. Super. 2024) (citation omitted). "For issues challenging the legality of a sentence, our standard of review is de novo, and the scope of our review is plenary." ***Id.*** (quotation marks and citation omitted).

Additionally, because Francis' claim requires us to interpret statutory language, we must abide by the Statutory Construction Act.[3] ***Commonwealth v. Gamby***, 283 A.3d 298, 306 (Pa. 2022). The paramount principle of the Statutory Construction Act is that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S. § 1921(a). The General Assembly's intent is first and foremost to be discerned through the plain language of the statutory provision in question. ***Commonwealth v. Coleman***, 285 A.3d 599, 605 (Pa. 2022); ***see also*** 1 Pa.C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."). "Therefore, when the terms of a statute are clear and unambiguous, they will be given effect consistent with their plain and common meaning." ***Gamby***, 283 A.3d at 306. Courts must also interpret and apply the statute as it is written, and we must not "insert words into a statute that are plainly not there." ***Commonwealth v. Green***, 291 A.3d 317, 327 (Pa. 2023) (citation and brackets omitted).

Pennsylvania DUI Law

For a DUI offense in another jurisdiction to constitute a "prior offense" pursuant to section 3806, the offense must be "substantially similar" to an

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[3] 1 Pa.C.S. §§ 1501-1991.

offense under section 3802. 75 Pa.C.S. § 3806(a)(1), (3). This analysis requires us to look beyond the words of the statutes at issue and examine the scope of the prohibited conduct, as defined by the respective legislatures and state courts. ***Dourlain***, 315 A.3d at 873 (citing ***Scott v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing***, 790 A.2d 291, 298 (Pa. 2002)); ***see also id.*** at 874-77. If an out-of-state statute solely punishes conduct that is not criminalized by Pennsylvania's DUI law, the two will not be found to be substantially similar. ***See id.*** at 877 (holding Ohio's "physical control of a vehicle while under the influence" statute was not substantially similar to Pennsylvania's DUI statute because it "punishe[d] conduct that would not be a crime under Pennsylvania's DUI statute").

Pennsylvania's DUI statute provides, in pertinent part:

> **(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.
> >
> > (2) 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 alcohol concentration in the individual's blood or breath is at least 0.08% but less than 0.10% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.
>
> **(b) High rate of alcohol.--**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 alcohol concentration in the individual's blood or breath is at least 0.10%

> but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.
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> **(c) Highest rate of alcohol.--**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 alcohol concentration in the individual's blood or breath is 0.16% or higher within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

75 Pa.C.S. § 3802(a)-(c). Consistent in each subsection of the DUI statute is the requirement that the individual "drive, operate or be in actual physical control of the movement of a vehicle." ***Id.***; ***see also Dourlain***, 315 A.3d at 874.

Our Supreme Court has distilled the phrase "to drive, operate, or be in actual physical control of the movement of a vehicle," to mean that a person must have driven the vehicle while intoxicated to be guilty of DUI under section 3802. ***Bold v. Dep't of Transp., Bureau of Driver Licensing***, 320 A.3d 1185 (Pa. 2024). In ***Bold***, a police officer found the defendant in an intoxicated state in the driver's seat of a stationary and legally parked vehicle with the engine running and the headlights illuminated. ***Id.*** at 1187. Although the officer admitted that he had no evidence that the defendant had driven the vehicle while intoxicated, he arrested him and took him to a nearby hospital where the defendant refused to consent to a blood draw. ***Id.*** at 1187-88. Because of this refusal, the defendant was subject to a driver's license

suspension. ***Id.*** at 1187; ***see also*** 75 Pa.C.S. § 1547.[4] The defendant appealed the suspension, which the trial court overturned, finding no evidence that the defendant was "in control of the movement of the vehicle at any time before he was arrested for [DUI]." ***Bold***, 320 A.3d at 1188. An en banc panel of the Commonwealth Court reversed the trial court's decision and reinstated the suspension. ***Id.*** at 1189.

Our Supreme Court granted allowance of appeal to clarify the definition of the phrase "to drive, operate, or be in actual physical control of the movement of a vehicle" in the DUI statute, and whether vehicle movement is required for application of sections 1547 and 3802 of the Vehicle Code. ***Id.*** at 1187, 1191-95. The Court recognized the presumption against finding statutory language to be surplusage but found the terms "driving,"

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[4] Section 1547 provides, 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 or blood for the 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 in violation of section 1543(b)(1.1) (relating to driving while operating privilege is suspended or revoked), 3802 (relating to driving under influence of alcohol or controlled substance) or 3808(a)(2) (relating to illegally operating a motor vehicle not equipped with ignition interlock).

75 Pa.C.S. § 1547(a).

"operating," and "actual physical control of the movement," to be similar in meaning. ***Id.*** at 1193-96. The Supreme Court explained, for example, that the term "'operates' plainly encompasses 'driving' and arguably subsumes 'actual physical control of the movement of a vehicle' as well. Once a [vehicle] moves under a person's control, it clearly has been operated." ***Id.*** at 1194. Additionally, the Court explained that "the title of section 3802 refers only to driving under influence of alcohol or controlled substance, even as its body adds operation and actual physical control of the movement to the mix." ***Id.***

The Supreme Court therefore reasoned that "[t]he use of the word 'actual' as well as the definite article in 'the movement' at least suggest that the driver actually has to have done something, that there was an actual movement near in time to the police encounter—or at least reasonable grounds to suspect such actual movement." ***Id.*** at 1193. In short, the Court held that "the Vehicle Code's provisions pertaining to DUI aim to deter one hazardous behavior that imperils public safety and one only: *driving* under the influence," and thus "the statute must be interpreted in service of its clear intention to deter, detect, and punish intoxicated *driving*." ***Id.*** at 1197-98 (explaining that "control of the movement [of a vehicle] requires some suspicion of driving, commonly understood"), 1201 (emphasis in original).

Because the officer conceded that he had no reason to believe that the defendant had been driving while intoxicated, the Court concluded that the defendant should not have been subject to a license suspension under section

1547. ***Id.*** The Supreme Court therefore reversed the Commonwealth Court's decision. ***Id.***

West Virginia's DUI Statute

The statutory provision under which Francis was previously convicted in West Virginia provided, in pertinent part:

> Any person who drives a vehicle in this state: (i) while he or she is in an impaired state or (ii) while he or she is in an impaired state but has an alcohol concentration in his or her blood of less than fifteen hundredths of one percent by weight, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for up to six months and shall be fined not less than $100 nor more than $500: *Provided*, That a person sentenced pursuant to this subsection shall receive credit for any period of actual confinement he or she served upon arrest for the subject offense.

W. Va. Code § 17C-5-2(e) (2016) (effective June 10, 2016 to June 2, 2019) (emphasis in original). The provision further provides that "'impaired state' means a person … [i]s under the influence of alcohol … or … [h]as an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight." ***Id.*** § 17C-5-2(a)(1)(A), (E). Thus, this provision prohibited a person from driving a vehicle while intoxicated or with a BAC of .08% or more but less than .15%. ***See*** § 17C-5-2(e).

Although the statute does not define the term "drives" and the caselaw from West Virginia regarding the term is scant, the Supreme Court of Appeals of West Virginia has stated that under section 17C-5-2,

> movement of a vehicle is an essential element of the statutory requirement, [but] the mere movement of a vehicle does not necessarily, in every circumstance, constitute a 'driving' of the vehicle. To 'drive' a vehicle necessarily implies a driver or

> operator and an affirmative or positive action on the part of the driver. A mere movement of the vehicle might occur without any affirmative act by a driver, or, in fact by any person. If a vehicle is moved by some power beyond the control of the driver, or by accident, it is not such an affirmative or positive action on the part of the driver as will constitute a driving of a vehicle within the meaning of the statute.

State v. Taft, 102 S.E.2d 152, 154 (W. Va. 1958). Additionally, West Virginia law

> does not require that a police officer actually see or observe a person move, drive, or operate a motor vehicle while the officer is physically present before the officer can charge that person with DUI under this statute, so long as all the surrounding circumstances indicate the vehicle could not otherwise be located where it is unless it was driven there by that person.

Montgomery v. State Police, 600 S.E.2d 223, 229 (W. Va. 2004) (citation omitted).

Francis' Arguments

Francis argues that West Virginia's DUI statute is not substantially similar to Pennsylvania's DUI statute for two reasons. First, she contends that "the Pennsylvania [s]tatute punishes conduct that would not necessarily be an offense under applicable West Virginia law." Francis' Brief at 15. Francis asserts that the Pennsylvania DUI statute "requires, at a minimum, some evidence that an intoxicated motorist exercised control over the movement of a vehicle which can occur while a vehicle is not moving," while "the West Virgina [s]tatute specifically sets forth the term 'drives' and, without a definition of that term appearing in the [s]tatute, is suggestive of a motorist

actively doing something to move a vehicle from one physical location to another." ***Id.***

Second, Francis contends that the Pennsylvania DUI statute contains an element that is not present in the West Virginia statute. ***Id.*** at 13-16. Specifically, she points to section 3802(c), which "prohibits driving, operating or being in actual physical control of the movement of a vehicle" where the individuals' BAC "is 0.16% or higher **within two hours** after the individual has driven, operated or been in actual physical control of the movement of the vehicle." ***Id.*** at 14 (emphasis in original). In contrast, the West Virginia statute contains no time restriction regarding measuring an individual's BAC after having driven a vehicle. ***Id.*** at 15. Francis therefore contends that West Virginia's statute punishes conduct that would not be a crime in Pennsylvania, as an individual could drive a motor vehicle in Pennsylvania at a time when their BAC was above the legal limit and there was no proof that that their BAC exceeded the legal limit within two hours of driving. ***Id.*** at 16.

Trial Court's Decision

The trial court determined that Francis' West Virginia DUI conviction constituted a "prior offense" for purposes of sentencing under section 3806. Trial Court Opinion, 6/23/2025, at 4-5. The court explained that Francis "was convicted in West Virginia under a statute that prohibited a person from driving while under the influence of alcohol or with a BAC of .08% or higher but less than 0.15%," and thus, "[c]learly, this West Virginia statute is

designed to prevent persons from driving while incapable of safe driving due to alcohol intoxication." ***Id.*** at 4. The trial court therefore found that as section "3802(a)(1) and the West Virginia statute prohibit comparable conduct, the two statutes are substantially similar." ***Id.***

Regarding Pennsylvania's requirement that the defendant's BAC be measured within two hours after the individual has driven, the trial court found it "irrelevant that West Virginia did not require the blood to be drawn within two hours of driving, as both statutes are designed to prevent a person from driving while impaired due to alcohol consumption." ***Id.*** The court explained that the "fact that Pennsylvania includes an additional requirement regarding the timing of blood alcohol testing is a distinction without legal significance," as the "West Virginia statute at issue directly addresses the same public safety concerns as Pennsylvania's general impairment and highest BAC offenses." ***Id.*** at 4-5.

Analysis

Reviewing the Pennsylvania and West Virginia DUI statutes and how the courts of each state have interpreted the operative language of each provision, the scope of the conduct that West Virginia's DUI statute prohibits is nearly identical to what Pennsylvania's DUI statute prohibits. ***Compare*** 75 Pa.C.S. § 3802, ***with*** W. Va. Code § 17C-5-2(e) (2016); ***see also Bold***, 320 A.3d at 1193-96, 1201; ***Taft***, 102 S.E.2d at 154. Put simply, both statutes punish an individual for having **driven** a motor vehicle while under the influence of

alcohol. ***Id.*** Thus, this is not a case where the West Virginia statute punishes conduct that would not be a crime in Pennsylvania. ***See Dourlain***, 315 A.3d at 877.

In support of her position, Francis relies on ***Commonwealth v. Leib***, 588 A.2d 922 (Pa. Super. 1991). In that case, this Court stated,

> The crime of driving under the influence can be committed not only by a person who drives but also by one who "operates" or is "in actual physical control" of the movement of a vehicle. A person does not drive unless he actually has the vehicle in motion, however, a person may operate or be in actual physical control of the movement of a standing vehicle. These terms are more comprehensive than the term drive. (They cover certain situations where a person under the influence is a threat to public safety even though he is not driving at the time.) Thus[,] a person operates a vehicle if he is in actual physical control of either the machinery of the motor vehicle or the movement of the vehicle itself.

Id. at 926 (citation omitted).

Francis' reliance on ***Leib*** is misplaced. First, section 3806 requires only that Pennsylvania encompass the conduct prohibited by the other jurisdiction's statute, not the other way around. To the extent that Pennsylvania's statute had previously been interpreted to punish driving under the influence as well as other conduct not encompassed by West Virginia's statute, it is of no moment, because Francis' conduct of driving under the influence of alcohol in West Virginia is also a crime under Pennsylvania's DUI law. As the conduct for which she was convicted in West Virginia also would have constituted DUI if committed in Pennsylvania, the two are substantially similar.

Additionally, our Supreme Court's decision in ***Bold*** overrules this aspect of ***Leib***. ***Leib*** predates ***Bold***, which, as discussed above, set forth intervening authority from our Supreme Court clarifying the conduct that the Pennsylvania DUI statute prohibits. While generally "[i]t is beyond the power of a Superior Court panel to overrule a prior decision of the Superior Court," an exception exists "in circumstances where intervening authority by our Supreme Court calls into question a previous decision of this Court." ***Commonwealth v. Summers***, 245 A.3d 686, 700 (Pa. Super. 2021). Tellingly, Francis does not cite ***Bold*** in her appellate brief and thus does not explain how ***Leib*** could remain good law following ***Bold***. We therefore find Francis' reliance on ***Leib*** unavailing.

As to Francis' argument regarding Pennsylvania's two-hour rule as a differentiator between the Pennsylvania and West Virginia statutes at issue, we find her contention meritless. As stated above, the Pennsylvania DUI statute states that for an individual to be guilty under section 3802(a)(2), (b), or (c), there must be evidence that the individual's BAC exceeded the limits set forth in those provisions within two hours after the individual drove. ***See*** 75 Pa.C.S. § 3802 (a)(2), (b), (c). The two-hour rule, however, ultimately affects only the grading and sentencing of the individual's DUI offense. ***See id.*** § 3803(a), (b). It has nothing to do with the conduct the statute seeks to

prohibit, namely, driving a motor vehicle while under the influence of alcohol.[5] ***See id.*** § 3802; ***see also Bold***, 320 A.3d at 1193-96, 1201.

Further, the two-hour rule is not absolute, as subsection (g) of section 3802 provides:

> **(g) Exception to two-hour rule.--**Notwithstanding the provisions of subsection (a), (b), (c), (e), (f) or (h), where alcohol or controlled substance concentration in an individual's blood or breath is an element of the offense, evidence of such alcohol or controlled substance concentration more than two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle is sufficient to establish that element of the offense under the following circumstances:
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> > (1) where the Commonwealth shows good cause explaining why the chemical test sample could not be obtained within two hours; and
> >
> > (2) where the Commonwealth establishes that the individual did not imbibe any alcohol or utilize a controlled substance between the time the individual was arrested and the time the sample was obtained.

75 Pa.C.S. § 3802(g). Moreover, the two-hour rule does not apply to a Pennsylvania DUI where the person is found to have been driving under the influence of alcohol to the extent it renders the person "incapable of safely

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[5] We note that under the West Virginia DUI statute, "[a] sample or specimen taken to determine the alcohol concentration of a person's blood, must be taken within two hours from the time of the person's arrest." W. Va. Code § 17C-5-8(g)(1) (2026). Thus, West Virginia also has a two-hour rule. The sole distinction between the Pennsylvania and West Virginia two-hour rules is that the Pennsylvania statute requires the individual's BAC to be measured within two hours of driving, while the West Virginia statute requires the BAC to be measured within two hours of arrest. ***Compare*** 75 Pa.C.S. § 3802(a)(2), (b), (c), ***with*** W. Va. Code § 17C-5-8(g)(1) (2026).

driving[.]" ***Id.*** § 3802(a)(1). In fact, no evidence of BAC is necessary to support a conviction under subsection (a)(1).

Based on the foregoing, we decline to find that the two-hour rule renders West Virginia's DUI statute not substantially similar to Pennsylvania's DUI statute. Accordingly, we hold that West Virginia's DUI offense, W. Va. Code § 17C-5-2(e) (2016), as interpreted and construed by its courts, is substantially similar to Pennsylvania's DUI offense.

Conclusion

The trial court did not err in determining that the West Virginia statute at issue is substantially similar to Pennsylvania's DUI statue. Thus, the trial court likewise did not err in treating Francis' prior conviction of DUI in West Virginia as a prior offense pursuant to section 3806(a)(3) of the Vehicle Code and grading Francis' instant conviction of DUI as her fourth or subsequent offense in ten years. Accordingly, we affirm Francis' judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

Date: 11/18/2026