NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RONALD LANGHAM, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2590 EDA 2012

Appeal from the Judgment of Sentence of August 9, 2012
In the Court of Common Pleas of Pike County
Criminal Division at No(s): CP-52-CR-0000468-2011

BEFORE: STEVENS, P.J., OLSON AND STRASSBURGER,* JJ.

MEMORANDUM BY OLSON, J.: **FILED JULY 16, 2013**

Appellant, Ronald Langham, appeals from the judgment of sentence entered on August 9, 2012 following his bench trial convictions for two counts of driving under the influence of alcohol (DUI) and two summary driving offenses.[1] After careful consideration, we affirm.

The facts of this case, as set forth by the trial court, are as follows:

> On March 11, 2011 at approximately 8:45 p.m. [] Appellant [] was operating a motor vehicle on SR 390, Palmyra [Township] in Pike County. Pennsylvania State Police Trooper Jeremy Carroll observed Appellant driving up behind him in a large pickup truck and tailgating him. The Trooper pulled over and allowed Appellant to pass. Later,

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[1] 75 Pa.C.S.A. §§ 3802(a)(1) (DUI general impairment), 3802(a)(2) (DUI blood alcohol content at least 0.08% but less than 0.10% within two hours after driving), 3361 (driving vehicle at safe speed), and 3714 (careless driving).

*Retired Senior Judge assigned to the Superior Court.

Trooper Carroll conducted a traffic stop after observing Appellant driving sixty-five miles an hour and changing lanes abruptly without signaling. During the stop, Appellant informed Trooper Carroll that he was on his way to his girlfriend's house in Hawley because she was going to kill herself. Upon hearing this information and concerned about the safety of the girlfriend, Trooper Carroll followed Appellant to Appellant's girlfriend's house. Trooper Carroll testified Appellant's driving was erratic on the way to his girlfriend's house. Once Appellant and Trooper Carroll arrived at the house, Appellant pulled into the driveway and exited his vehicle. Trooper Carroll observed Appellant step sideways from the car and proceed to stumble forward in the driveway. At this point Trooper Carroll suspected Appellant to be impaired.

Trooper Carroll followed Appellant onto the porch and stayed there while Appellant went inside to talk to his girlfriend, Tracey Gorman. Trooper Carroll then motioned [for] Ms. Gorman to come out on the porch after he observed Appellant whispering to her. Trooper Carroll asked Ms. Gorman if she was going to kill herself to which the girlfriend responded "she was not, she had a lot to live for, she didn't know why he made that up." Ms. Gorman testified she did tell Trooper Carroll she threatened to kill herself due to a very nasty custody battle. Trooper Carroll then had Appellant come back outside and asked him how much he had to drink. Appellant responded that he had one drink. Appellant testified that he had a drink in Ms. Gorman's kitchen when Trooper Carroll was on the porch talking to Ms. Gorman. However, Trooper Carroll testified he did not let Appellant out of his sight while standing on the porch talking to Ms. Gorman. Trooper Carroll observed Appellant's eyes to be red and glossy and smelled alcohol on him. Trooper Carroll administered the Horizontal Gaze Nystagmus [(HGN)] followed by the one-legged stand tests. Trooper Carroll testified that Appellant could not complete the tests due to an injury.

Based upon all of his observations, Trooper Carroll concluded he had probable cause of Appellant's intoxication and he took Appellant into custody and transported him to the Blooming Grove Barracks for a breathalyzer exam. Upon arrival at the barracks, the breath test was

> administered by Trooper Fells, a certified breath test operator. The lower of [Appellant's] two tests was a blood alcohol level of .094 [%].
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> Prior to trial, the Commonwealth made an oral [m]otion to [a]mend the [c]riminal [i]nformation from a first offense to a second offense after receiving information as to the disposition of a prior DUI arrest in Mobile, Alabama. [Appellant] was convicted in District Court of Alabama of a DUI which was appealed to Circuit Court. Upon agreement with [c]ounsel if Appellant completed DUI school, did not incur any new arrests and paid a fine, the matter would be nol prossed a year later. [The] Commonwealth stated that the conviction in Alabama is similar to Pennsylvania's [Accelerated Rehabilitative Disposition (ARD)] program which would count as a first offense. Appellant argued that the matter is not on his driving records and therefore the instant offense would count as his first offense. The [c]ourt granted the Commonwealth's [m]otion and allowed the amendment to the criminal information from first offense to second offense based on the Alabama offense.
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> Following a one day non[-]jury trial, [] Appellant was found guilty of all [four] [c]ounts. In support of its verdict on June 21, 2012, [the trial court] found Trooper Carroll's testimony to be more credible than Ms. Gorman's because Trooper Carroll's actions were more consistent with standard investigative procedures for situations such as these.

Trial Court Opinion, 11/7/2012, at 1-4 (record citations omitted).

On August 9, 2012, the trial court sentenced Appellant to five days to six months of incarceration on the two DUI charges and the cost of prosecution and fines for the summary driving offenses. In addition, the

trial court ordered the suspension of his driver's license for one year. This timely appeal followed.[2]

On appeal, Appellant presents four issues for our review:

1. Whether it was proven beyond a reasonable doubt that [Appellant] operated a motor vehicle after imbibing a sufficient amount of alcohol such that he was incapable of safe driving?

2. Whether it was proven beyond a reasonable doubt that [Appellant] operated or was in actual physical control of the vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration of his breath was 0.94% within two hours of having operated the vehicle?

3. Whether the trial court erred when granting the Commonwealth's motion to amend the criminal information from a first offense [DUI] to a second offense [DUI], without requiring the Commonwealth to show the alleged offense in Alabama was substantially similar to the offense in Pennsylvania?

4. Whether the trial court erred when granting the Commonwealth's objection to defense counsel's cross-examination of the Pennsylvania State Trooper regarding his knowledge and ability to administer the standardized field sobriety test?

Appellant's Brief at 5 (complete capitalization omitted).

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[2] Appellant filed a notice of appeal on September 7, 2012. On September 10, 2012, the trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant complied timely on October 1, 2012. The trial court entered an opinion pursuant to Pa.R.A.P. 1925(a) on November 6, 2012 and a subsequent corrected opinion on November 7, 2012.

Appellant's first two issues challenge the sufficiency of the evidence to support his DUI convictions. Hence, we will examine them together. Our standard of review is as follows:

> When reviewing the sufficiency of the evidence, this Court must determine whether all of the evidence admitted at trial, when viewed in the light most favorable to the verdict winner, was sufficient to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying this test, this Court may not re-weigh the evidence and may not substitute its judgment for that of the fact-finder.

Commonwealth v. Kutzel, 64 A.3d 1114, 1117 (Pa. Super. 2013) (citation omitted).

Appellant essentially argues the Commonwealth failed to prove that he had consumed alcohol **prior** to driving.[3] First, he points to the fact that "Trooper Carroll did not detect an odor of alcoholic beverage emanating from [Appellant's] person during the initial traffic stop." ***Id.*** at 12. He contends that by allowing him to drive to his girlfriend's house, and continuing to let him drive despite watching him cross the centerline and fog line several times, police believed he was capable of safe driving. Next, Appellant avers he had two interactions with police, but that the "Trooper first noticed the odor of alcoholic beverages emanating from [Appellant's] person after he was in Ms. Gorman's residence for a period of time." ***Id.*** at 15. He

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[3] Appellant concedes that he was driving the vehicle in question. Appellant's Brief at 13. Moreover, he does not challenge the sufficiency of evidence to support his summary convictions.

maintains the trial court erred in not crediting testimony that Appellant drank an alcoholic beverage in Ms. Gorman's kitchen while Trooper Carroll spoke with her on the front porch. ***Id.*** at 14.

Appellant was convicted of two separate counts of DUI pursuant to 75 Pa.C.S.A. §§ 3802(a)(1) and (a)(2), which state 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.
>
> (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.

75 Pa.C.S.A. § 3802(a).

In this case, Trooper Carroll first witnessed Appellant "drive up fast behind" him and then tailgate the trooper's unmarked vehicle. N.T., 6/21/2012, at 10. Appellant passed Trooper Carroll and "took off at a high rate of speed" that the trooper estimated to be "sixty-five miles an hour in a thirty-five mile per hour zone." ***Id.*** Trooper Carroll pulled Appellant over at approximately 8:45 p.m. ***Id.*** at 37. Appellant told Trooper Carroll "that he was on his way to his girlfriend's house because she was going to kill

herself." ***Id.*** at 12. Appellant was unable to give a precise location, so Trooper Carroll had Appellant lead him there. ***Id.*** Trooper Carroll followed Appellant on a fifteen-minute drive and described his driving as "very erratic" and "over the center line and over the fog line many times." ***Id.*** at 12-13. When they reached the residence of Appellant's girlfriend, Appellant exited his vehicle, began walking sideways, and stumbled up the driveway. ***Id.*** at 13. It was at this point that Trooper Carroll believed Appellant was impaired. ***Id.*** Appellant went into the house and began whispering to his girlfriend, Ms. Gorman. ***Id.*** at 14. Trooper Carroll asked Ms. Gorman to speak with him on the porch. ***Id.*** He never lost sight of Appellant, who remained just inside the front door. ***Id.*** After confirming that Ms. Gorman was not suicidal, Trooper Carroll directed Appellant to come back outside. ***Id.*** at 15. Trooper Carroll noted it was his "first real face-to-face" contact with Appellant since the initial interaction. ***Id.*** At that point, Trooper Carroll observed Appellant's eyes were red and glossy and he smelled alcohol emanating from Appellant's person. ***Id.*** Appellant admitted that he had consumed one beer. ***Id.*** Trooper Carroll administered two field sobriety examinations that Appellant failed. ***Id.*** at 15-16. Trooper Carroll took Appellant into custody. ***Id.*** at 17. At the police station, Appellant gave consent for breath tests. ***Id.*** At 9:56 p.m., Officer William Fells conducted two breath tests and Appellant's blood alcohol content (BAC) was .094 %. ***Id.*** at 46.

The evidence, viewed in the light most favorable to the Commonwealth, was sufficient to support both DUI convictions under the two aforementioned statutory subsections. First, Appellant does not contest the fact that he was driving. Next, Appellant's speeding and erratic driving coupled with his subsequent stumbling established that he was not capable of safe driving. Trooper Carroll witnessed Appellant stumbling before he entered Ms. Gorman's residence and, at that moment, he believed Appellant to be impaired. Appellant was within sight of Trooper Carroll throughout their entire interaction and police did not observe Appellant consume alcohol after he had driven.[4] Appellant displayed classic indicia of intoxication – red, glossy eyes, an odor of alcohol, and an inability to complete field sobriety tests. Moreover, Appellant admitted he had been drinking alcohol. These facts were sufficient to support a finding that Appellant had consumed alcohol before operating the vehicle. Finally, Appellant's BAC was .094% within two hours of driving. Based upon all of the foregoing, we conclude there was sufficient evidence to support both of Appellant's DUI convictions. As such, Appellant's first two issues fail.

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[4] In its opinion, the trial court stated: "While there was a conflict in testimony between the Commonwealth's chief witness Trooper Carroll and that of defense witnesses, [the trial court] found Trooper Carroll's to be more credible." Trial Court Opinion, 11/7/2012, at 6. Based upon our standard of review, we may not substitute our own credibility determinations for those of the trial court. ***Kutzel***, 64 A.3d at 1117.

In his third issue presented, Appellant argues that the trial court erred by granting the Commonwealth's motion to amend the criminal information prior to trial. Appellant's Brief at 15. More specifically, Appellant claims the Commonwealth failed to prove that a prior Alabama DUI offense was substantially similar to Pennsylvania's DUI law to constitute a second offense under 75 Pa.C.S.A. § 3806. Appellant's Brief at 16. Appellant claims the trial court erred by concluding the disposition of the prior Alabama matter was substantially similar to Pennsylvania's ARD program. ***Id.*** at 17. Instead, Appellant maintains the trial court was required to look at the offenses and "the Commonwealth failed to provide the [c]ourt with any documentation identifying the elements of [DUI] in Alabama and how those elements are substantially similar to the Pennsylvania [s]tatute." ***Id.***

Appellant challenges the amendment of the bill of criminal information that ultimately led to a mandatory sentence for a second DUI offense. We begin with our standard of review:

> Generally, the imposition of sentence is vested within the discretion of the sentencing court and will not be disturbed by an appellate court absent a manifest abuse of discretion. A challenge to a sentencing court's application of a mandatory sentencing provision, however, implicates the legality, not the discretionary, aspects of sentencing. The determination as to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary.

Commonwealth v. Love, 957 A.2d 765, 767 (Pa. Super. 2008) (internal citations, quotations and brackets omitted).

Herein, we examine the trial court's interpretation of the mandatory minimum sentencing provisions set forth at 75 Pa.C.S.A. § 3806(a). "When the language of a statute is clear and unambiguous, the judiciary must read its provisions in accordance with their plain meaning and common usage." ***Love,*** 957 A.2d at 767 (citation omitted). Section 3806(a) provides:

> **(a) General rule.--**Except as set forth in subsection (b), the term "prior offense" as used in this chapter shall mean a conviction, adjudication of delinquency, juvenile consent decree, **acceptance of 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);
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> (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).

75 Pa.C.S.A. § 3806(a) (emphasis added).

"The plain language of the statute clearly sets forth that acceptance of ARD, **or other forms of preliminary dispositions**, constitutes the equivalent of a conviction for sentencing purposes." ***Love***, 957 A.2d at 768 (emphasis added). Moreover, "this Court has already determined that, under Section 3806, ARD must be considered a conviction for sentencing

purposes." ***Id.***, *citing* ***Commonwealth v. Pleger***, 934 A.2d 715 (Pa. Super. 2007).

In this case, the trial court determined:

> The documents from Alabama show that [Appellant] was ordered to complete [DUI] School and pay the costs of [c]ourt and a fine in the amount of $600 as well as have no new arrests. In exchange for compliance with these terms, the case was nolle prossed a year later. While not exactly the same as the Pennsylvania's ARD program, it is substantially similar by giving [Appellant] a chance to clear his record if he followed a set of terms established by the [c]ourt. Since ARD is considered a prior conviction in Pennsylvania, [the trial court] found the Alabama offense to be a prior conviction.

Trial Court Opinion, 11/7/2012, at 7.

Initially, we note that a prior offense under Section 3806 requires acceptance of ARD **or other form of preliminary disposition** on an offense in another jurisdiction that is substantially similar to an offense under Section 3802. Here, Appellant stipulated to a *prima facie* case of DUI in Alabama in exchange for a form of preliminary disposition. As previously stated, in Pennsylvania, Section 3802(a) provides that "[a]n 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.A. § 3802(a). Appellant agreed he committed a DUI in Alabama and accepted attendant conditions prior to sentencing in that matter. Hence, the Alabama DUI constituted a

prior offense under Section 3802. In looking at the ultimate disposition in Alabama to determine whether Appellant had a prior offense within the meaning of § 3806(a), the trial court by necessary implication looked at whether Appellant committed a substantially similar offense in Alabama. We find no error in the trial court's analysis.

Moreover, we find the Pennsylvania Supreme Court's description of ARD instructive:

> ARD was established pursuant to Rules 175-185 of the Pennsylvania Rules of Criminal Procedure promulgated by this Court on May 24, 1972. In the comment accompanying Rule 185, the Criminal Procedural Rules Committee noted that the program was designed to dispose promptly of relatively minor cases involving social or behavioral problems "which can best be solved by programs and treatments rather than by punishment." Pa.R.Crim.P. 185, comment. Although legal defenses may be available in many of the cases selected for ARD which would result in acquittal or delay if tried, the program is attractive to many defendants because it provides them with an opportunity to "earn a clean record…" ***Id.*** Indeed, **the fundamental appeal of ARD for first time offenders is the avoidance of a criminal record**.
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> * * *
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> **By recommending an accused for ARD, the Commonwealth agrees that he will be free from criminal responsibility if he successfully completes the ARD program.** Therefore, it is likely that the accused enters into this agreement with the understanding that if he successfully completes the ARD program his record will be expunged.

Commonwealth v. Armstrong, 434 A.2d 1205, 1207-1208 (Pa. 1981).

In the case *sub judice*, Appellant's Alabama DUI offense was disposed of similarly. Upon paying court costs and fines and avoiding arrest for a full

year, Appellant earned a clean record in Alabama. This disposition mirrors Pennsylvania's ARD program.[5] Under Section 3806, ARD must be considered a conviction for sentencing purposes. ***Love***, 957 A.2d at 768.

Finally, Alabama's DUI law provides:

> **§ 32-5A-191. Driving while under influence of alcohol, controlled substances, etc.**
>
> (a) A person shall not drive or be in actual physical control of any vehicle while:
>
> (1) There is 0.08 percent or more by weight of alcohol in his or her blood;
>
> (2) Under the influence of alcohol;
>
> (3) Under the influence of a controlled substance to a degree which renders him or her incapable of safely driving;
>
> (4) Under the combined influence of alcohol and a controlled substance to a degree which renders him or her incapable of safely driving; or
>
> (5) Under the influence of any substance which impairs the mental or physical faculties of such person to a degree which renders him or her incapable of safely driving.

Ala. Code § 32-5A-191.

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[5] While Pennsylvania recognizes expungement, and Alabama enters nol pros upon completion of certain requirements, we believe the difference between the two statutory schemes is without significant distinction in this case. The end result is the same.

Pursuant to Subsection (a)(2) above, Alabama requires only that a person shall not drive under the influence of alcohol. This is substantially similar to Section 3802(a)(1). For all of the foregoing reasons, the trial court did not err in permitting amendment of the criminal information based upon 75 Pa.C.S.A. § 3806. Accordingly, Appellant's third argument fails.

In his final issue presented on appeal, Appellant avers that the trial court erred by limiting defense counsel's cross-examination of Trooper Carroll regarding his ability to administer standardized field sobriety tests. Appellant's Brief at 17. He claims cross-examination was necessary to "challenge[] Trooper Carroll's credibility and his investigative procedures." ***Id.*** at 18. More specifically, Appellant points to Trooper Carroll's testimony where he: (1) was unable to identify the specific order sobriety tests were to be administered, and (2) acknowledged he improperly administered the HGN test. ***Id.*** Appellant also posits that cross-examination of Trooper Carroll regarding field sobriety tests was necessary to "question[] whether Trooper Carroll had reasonable grounds necessary to place [Appellant] under arrest." ***Id.***

"A trial court has discretion to determine both the scope and the permissible limits of cross-examination." ***Commonwealth v. Briggs***, 12 A.3d 291, 335 (Pa. 2011). "The trial judge's exercise of judgment in setting those limits will not be reversed in the absence of a clear abuse of that discretion, or an error of law." ***Id.*** (citation omitted). "[T]his [C]ourt [has] held that the results of the 'horizontal gaze nystagmus' (HGN) field sobriety

test [are] inadmissible to prove intoxication." ***Commonwealth v. Apollo***, 603 A.2d 1023 (Pa. Super. 1992). However, "[a] police officer may utilize both his experience and personal observations to render an opinion as to whether a person is intoxicated." ***Commonwealth v. Kelley***, 652 A.2d 378, 382 (Pa. Super. 1994). Police must have probable cause to arrest a DUI suspect; "[p]robable cause exists where the officer has knowledge of sufficient facts and circumstances to warrant a prudent person to believe that the driver has been driving under the influence of alcohol or a controlled substance." ***Commonwealth v. Hilliar***, 943 A.2d 984, 994 (Pa. Super. 2008).

In this case, the trial court limited Appellant's cross-examination of Trooper Carroll because "[t]he HGN test results are not admissible here in court, so [if] that was the only basis for the officer taking him into custody we might have a problem, but he has already indicated he had other bases for that, so let's move along." N.T., 6/21/2012, at 31-32. We discern no abuse of discretion. As previously stated, Trooper Carroll permissibly testified regarding his personal observation of multiple additional signs of Appellant's intoxication that ultimately lead to the arrest. Cross-examining Trooper Carroll regarding field sobriety tests was unnecessary to determine whether he had reasonable grounds to arrest. Accordingly, Appellant's last argument fails.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 7/16/2013