NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
CARLOS GUZMAN,	:	
	:	
Appellant	:	No. 2712 EDA 2012

Appeal from the Judgment of Sentence November 12, 2010
In the Court of Common Pleas of Pike County
Criminal Division No(s).: CP-52-CR-0000133-2009

BEFORE: BENDER, P.J., PANELLA, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED SEPTEMBER 25, 2013**

Appellant, Carlos Guzman, appeals *nunc pro tunc* from the judgment of sentence entered in the Pike County Court of Common Pleas after a jury convicted him of driving under the influence (DUI)—incapable of safely driving and DUI—highest rate.[1] Appellant claims that the evidence was insufficient to prove that he committed DUI offenses while on a "trafficway" as defined by the Vehicle Code. ***See*** 75 Pa.C.S. § 102. We affirm the judgment of sentence in part, but vacate the sentence imposed on DUI—incapable of safely driving.

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* Former Justice specially assigned to the Superior Court.

[1] 75 Pa.C.S. § 3802(a), (c).

The trial court summarized the evidence presented at Appellant's trial as follows:

> [Appellant] was involved in a motorcycle accident inside Saw Creek Estates, a private gated community on April 27, 2008. Prior to the accident, [Appellant] was at Top of the World, a restaurant and bar located inside Saw Creek Estates. Paul McIntyre, a Saw Creek public safety officer and patron of Top of the World on the night in question, saw [Appellant] at the bar area talking loudly, making inappropriate comments and appearing intoxicated. His wife Donna McIntyre testified that [Appellant] left the bar and drove his motorcycle in an erratic manner and swerving in and out of traffic. Jacqueline Borer, the bartender at the Top of the World on April 27, 2008, testified that [Appellant] appeared intoxicated when he arrived. [Appellant] ordered a gin and tonic but she served him tonic water without any alcohol in it due to his intoxicated state. She also testified that she tried to get [Appellant] to accept a ride home and that he vomited in the hallway before leaving on his motorcycle nearly hitting a parked car.
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> Karen Hanks, the dispatcher for Saw Creek Public Safety, testified that a call came in reporting a motorcycle accident at 8:50 p.m. on April 27, 2008. Public safety arrived at the crash scene three minutes later and EMT personnel arrived shortly after that. The responding EMT Robert Moran testified that [Appellant] was bleeding from his head and face and had a very strong alcoholic odor about him. The [C]ommonwealth entered into evidence the certified hospital records from St. Luke's, where [Appellant] was treated after being transported first by ambulance and then by helicopter. Dorothy Smith, a medical technologist with twenty-four years of experience, testified that [Appellant's] blood serum was drawn at 10:39 p.m. and subsequently tested. This Court accepted Dr. Michael Coyer as an expert in the field of forensic toxicology. Dr. Coyer testified that he examined the serum blood results and based on the conversion to whole blood, [Appellant's] blood alcohol content would be .187[%].

Trial Ct. Op., 11/30/12, at 5-6.

On September 17, 2010, a jury found Appellant guilty of DUI—incapable of safely driving and DUI—highest rate, and the trial court found him guilty of the summary offense of reckless driving.[2] On November 12, 2010, the trial court sentenced him to ninety days' to five years' imprisonment and a $5,000 fine, "on **each** charge of Driving Under the Influence." Order, 11/12/10, at 1 (emphasis added). The court also imposed a $200 fine and the costs of prosecution for reckless driving. ***Id.*** at 2.

On November 15, 2010, Appellant filed timely post-sentence motions challenging, *inter alia*, the sufficiency of the evidence. The trial court denied the post-sentence motions on November 29, 2010, and Appellant filed a notice of appeal on February 4, 2011. This Court, on September 14, 2011, quashed the appeal based on an untimely notice of appeal, and the Pennsylvania Supreme Court denied his petition for allowance of appeal. ***Commonwealth v. Guzman***, 311 EDA 2011 (unpublished memorandum) (Pa. Super. Sept. 14, 2011), *appeal denied*, 48 A.3d 1247 (Pa. 2012).

Appellant filed a Post Conviction Relief Act (PCRA)[3] petition seeking a direct appeal *nunc pro tunc*. The Commonwealth agreed to the reinstatement of Appellant's direct appeal rights, but the parties stipulated

[2] 75 Pa.C.S. § 3736.

[3] 42 Pa.C.S. §§ 9541-9546.

that his appeal claims were limited to certain claims preserved in his November 15, 2010 post-sentence motions. The PCRA court, on September 25, 2012, granted Appellant leave to appeal *nunc pro tunc*. Appellant filed a notice of appeal on October 3, 2012, and complied with the trial court's order to submit a Pa.R.A.P. 1925(b) statement of errors complained of on appeal.

Appellant presents a single issue for our review: whether the evidence at trial was sufficient to prove that he committed acts constituting DUI while on a "highway" or "trafficway." ***See*** Appellant's Brief at 10. The parties agree that the roads at issue in this appeal were not "highways," and that the applicability of the DUI statute depends on whether the roads in Saw Creek Estates were "trafficways" as defined in 75 Pa.C.S. § 102. Appellant asserts that the roadways in the private gated community were not trafficways because they were not "freely open to the general public . . . as a matter of right or custom." ***Id.*** at 8. He emphasizes that traffic is screened at the entrance to Saw Creek Estates, and that public access to the roads within the community is "heavily restricted." ***Id.*** at 8, 10-11.

The standards governing our review of the sufficiency of the evidence are well settled.

> [W]e must determine whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found that each and every element of the crimes charged was established beyond a reasonable doubt.

Commonwealth v. Zabierowsky, 730 A.2d 987, 988-89 (Pa. Super. 1999) (citations omitted).

The Commonwealth's DUI laws apply "upon highways and trafficways throughout this Commonwealth." 75 Pa.C.S. § 3101(b). A "trafficway" is defined as "The entire width between property lines or other boundary lines of every way or place of which any part is open to the public for purposes of vehicular travel as a matter of right or custom" 75 Pa.C.S. § 102.

This Court discussed the meaning of a trafficway in ***Commonwealth v. Wyland***, 987 A.2d 802 (Pa. Super. 2010). There, the defendant was charged with DUI for an incident that occurred on a United States Air Force base. ***Id.*** at 803. The defendant filed a motion to quash the criminal complaint, arguing that the Commonwealth's DUI laws did not apply to roads inside the base. ***Id.*** The trial court convened a hearing to determine whether the subject roads were trafficways. ***Id.*** The Commonwealth presented the following evidence:

> Mr. [Robert] Moeslein has been employed as a civil engineer at the base for twenty-one years, and he is responsible for maintaining all of the military facilities there. He testified that the installation is located on 12 acres of land owned by the federal government and 103 acres of land that the government leases from Allegheny County under an agreement which grants the government "exclusive use" of the property; however, the county is obligated to maintain the runway, remove snow at the airport, and provide fire rescue services pursuant to a separate contract. Although it is a military installation, Mr. Moeslein testified that civil engineering projects are sometimes awarded to civilian contractors, and two utility

> companies operate on the base: Duquesne Light Company owns a substation near the dining hall, and People's Natural Gas operates a facility adjacent to the fitness center. Thus, many civilians enter the installation on a daily basis.
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> With respect to security, Mr. Moeslein explained that no one is allowed to enter the base without permission from the commanding officer or security personnel who have authority to admit pre-approved visitors that can produce valid identification. Therefore, although civilians frequently enter the base, which is secured by a fence topped with barbed wire, they do so only with the express approval of United States Air Force personnel and are advised that while visiting the installation, their person and any property under their control are subject to search.
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> Major [John] Bojanac, who is the chief of security at the base, offered similar testimony. He confirmed that civilians and retired military personnel regularly enter the base for work, athletic contests, Boy Scout activities, Civil Air Patrol training, and functions held at the Officers' club, which can be rented for wedding receptions. The major also acknowledged that the Air Force executed an agreement with the Moon Township Police Department authorizing local police to assist military officers in responding to incidents occurring on the installation. However, the names of all non-military personnel who seek to enter the base must be submitted to Major Bojanac in advance, and they must receive security clearance or they will be denied entry at the main checkpoint.

Id. at 804 (citations omitted). The trial court in ***Wyland*** concluded that the roads inside the base were not trafficways and quashed the complaint. ***Id.***

The Commonwealth appealed to this Court, arguing that the frequency and regularity of public traffic inside the Air Force base was sufficient to establish that the roads were trafficways subject to the Commonwealth's DUI laws. ***Id.*** at 806. The Commonwealth likened the base to limited

access parking lots, which were held by this Court to be trafficways open to the public. ***Id.*** at 805-06 (discussing ***Zabierowsky***, 730 A.2d at 987, and ***Commonwealth v. Cameron***, 668 A.2d 1163 (Pa. Super. 1995)).

The ***Wyland*** Court rejected the Commonwealth's arguments that the frequency and regularity of public traffic inside the Air Force base was alone sufficient to prove that the roads therein were trafficways open to the public by right or custom. ***Id.*** at 806. We concluded:

> Contrary to the Commonwealth's view, the instant case is readily distinguishable from [the case law discussing parking lots] because it involves a heavily-guarded military installation, not a private parking area that can be accessed by the general public as a matter of right or custom. Members of the public can circumvent posted entry restrictions at a private parking lot that serves a business or residential building, and public parking garages are open to anyone who agrees to pay a nominal fee.
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> The testimony herein establishes that no one enters the [Air Force base] without prior authorization from the chief of security, who screens every individual who requests access to the base. Civilians permitted to enter the base do so for a stated, approved purpose and are subject to search at the discretion of security officers who constantly monitor the facility. Given these facts, it cannot be legitimately maintained that the base is open to the public as a matter of right or custom.

Id.

Thus, the critical inquiry in determining whether an area constitutes a section 102 trafficway is the nature of the area, the restrictions placed on access, and the means for excluding the public—that is, whether it is open to the public as a matter of right or custom. ***See id.*** at 806; 75 Pa.C.S. § 102.

Examples of closed areas include installations such as an Air Force base or airport service roads, access to which require security clearance and identification from members of the public. ***See Wyland*** 987 A.2d at 806; ***cf. Commonwealth v. Aircraft Serv. Int'l Group***, 917 A.2d 328 (Pa. Super. 2008) (discussing airport service road limited to individuals with proper identification). Moreover, private access roads, even if occasionally used by visitors, have been considered exempt from the Commonwealth's DUI laws. ***See Commonwealth v. McFadden***, 547 A.2d 774 (Pa. Super. 1988) (plurality) (holding that private, dead-end road leading to trailer park was not trafficway).

By contrast, areas such as parking lots are generally considered open to the public even if they are designated as private or have a specific purpose. ***See Zabierowsky***, 730 A.2d at 988, 990-91 (concluding that five-story garage accessible to public by payment of daily fee was trafficway); ***Cameron*** 668 A.2d at 1164 (concluding that parking lot of eleven-story apartment building was open to public by right and custom based on "sufficient number of users"); ***Commonwealth v. Wilson***, 553 A.2d 452, 453-54 (Pa. Super. 1989) (concluding that Elks Club parking lot marked "private" was open to public).

The frequency and regularity of public traffic in an area alone is not dispositive to the question of whether a road is a trafficway. ***See Wyland*** 987 A.2d at 805. However, the frequency of public use of a road remains

part of the circumstances to be considered by a court when determining whether an area is a section 102 trafficway "open to the public as a matter of right or custom." ***See Zabierowsky***, 730 A.2d at 987; ***Cameron*** 668 A.2d at 1164; ***Wilson***, 553 A.2d at 453-54.

The record in this appeal established that Saw Creek Estates was a private gated community of approximately 9,000 residents. N.T., 9/16/10, at 104. Public access was limited by gates and manned security booths. ***Id.*** at 47. Guests of the homeowners and patrons of the Top of World restaurant were screened at the gates. ***Id.*** at 40. However, the community did not have a central authority that approved or denied passes issued to the public by the residents or restaurant. ***See id.*** at 105-06 (noting that resident need only call to obtain pass for guest and that there were no limitations on number of guests). School buses, delivery services, and most utility services were not screened at the gate and had free entry into the community under existing agreements. ***Id.*** at 118. Once inside, a member of the public was not limited in his or her access to the road upon which Appellant operated his motor vehicle. ***Id.*** at 51.

In sum, any person or entity within the community was entitled to permit public access. No one single entity had a right to exclude a guest of another from accessing the roads within Saw Creek Estates. Additionally, the general public was entitled to access the roads of the community by placing a reservation with the Top of the World restaurant. Therefore,

despite the existence of gates and an approval process governing entry into the community, we conclude that the roads within the community were accessible and open to the public by right or custom. Thus, Appellant was traveling upon a trafficway within the meaning of section 102 at the time he committed the offenses, and was subject to conviction under the Commonwealth's DUI laws. ***See*** 75 Pa.C.S. § 3101. Accordingly, his challenge to the sufficiency of the evidence warrants no relief.

Although we have concluded that the road within Saw Creek Estates constituted a trafficway open to the public, we *sua sponte* consider the trial court's sentencing order, which imposed ninety days' to five years' imprisonment, as well as a $5,000 fine, "on **each** charge of Driving Under the Influence." Order, 11/12/10, at 1 (emphasis added). The docket also indicated that Appellant had been sentenced upon the count of DUI—incapable of safely driving, rather than the count of DUI—highest rate.

This Court can vacate an illegal sentence, including a sentence exceeding the lawful maximum, *sua sponte*. ***Commonwealth v. Infante***, 63 A.3d 358, 363 (Pa. Super. 2013). Under section 3803 of the Vehicle Code, DUI—incapable of safely driving with one prior conviction is an ungraded misdemeanor carrying a maximum sentence of six months. 75 Pa.C.S. § 3803(a)(1). DUI—highest rate with one prior conviction is a misdemeanor of the first degree carrying a maximum sentence of five years. ***See*** 18 Pa.C.S. § 1104(1); 75 Pa.C.S. § 3803 (b)(4). We further note that a

trial court is prohibited from imposing sentences upon convictions for different subsections of the DUI statute arising out of a single act. ***Commonwealth v. McCoy***, 895 A.2d 18, 25-26 (Pa. Super. 2006).

To the extent that the trial court suggested it was imposing sentence up to five year's imprisonment upon **each** of the counts of DUI, such sentence is in excess of the maximum statutorily authorized sentence for DUI—incapable of safely driving and violates the doctrine of merger. ***See Infante***, 63 A.3d at 363; ***McCoy***, 895 A.2d at 25-26. Therefore, we vacate the imposition of sentence on the count of DUI—incapable of safely driving. Since there is no effect on the intended sentencing scheme imposed by the court, there is no need for a remand. ***See Commonwealth v. Thur***, 906 A.2d 552, 570 (Pa. Super. 2003).

Judgment of sentence affirmed in part, and vacated in part. Jurisdiction relinquished.

Judgment Entered.

Prothonotary

Date: 9/25/2013