NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: A.T.B., A MINOR	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: A.T.B., A MINOR	No. 2224 MDA 2012

Appeal from the Dispositional Order of October 11, 2012
In the Court of Common Pleas of York County
Juvenile Division at No.: CP-67-JV-0000433-2012

BEFORE: DONOHUE, J., WECHT, J., and COLVILLE, J.*

MEMORANDUM BY WECHT, J.: **FILED SEPTEMBER 17, 2013**

A.T.B. ("Appellant") appeals from the dispositional order entered on October 11, 2012.[1] We affirm in part and vacate in part.

The juvenile court summarized the facts of the case as follows:

> This matter is before the Court for an incident that occurred on January 6, 2012, for which [Appellant] has been charged with resisting arrest, graded as a misdemeanor two; disorderly conduct, graded as a misdemeanor three; driving under the influence of alcohol or controlled substance, graded as an ungraded misdemeanor, specifically Section 3802(d)(2) of the Traffic Code; careless driving, graded as a summary offen[s]e;

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* Retired Senior Judge assigned to the Superior Court.

[1] Appellant purported to appeal from the October 11, 2012 adjudication of delinquency. An appeal properly lies from the dispositional order. ***In re J.D.***, 798 A.2d 210, 211 n.1 (Pa. Super. 2002). We have amended the caption accordingly.

and accidents involving damages to unattended vehicle or property, graded as a summary offense.[2]

The testimony is fairly undisputed that on January 6, 2012 [Appellant, then seventeen years old,] was the operator of a Ford Explorer, which travel[l]ed off the roadway and ended up in the yard of Gregory Davis, who resides in the Brogue area of York County. Mr. Davis discovered the vehicle in the early morning hours of January 6, 2012. He indicated that the vehicle had come to rest approximately 100 to 150 yards from the roadway. It was two feet from the side of his house, stuck on a rock retaining wall. There was damage to the vehicle. The vehicle's front wheels were off the ground, and after the vehicle was removed, there was rubber from the rear tires left behind. This was discovered sometime between 1 and 2 a.m. There was damage to the rock wall, a picnic table, a holly bush, and landscaping.

Mr. Davis did not see anyone in the area, but he did make a report, and [Pennsylvania State Trooper Nicholas Loughner] then investigated the accident. Upon running the registration of the vehicle, the owner of the vehicle was determined to be either Timothy Rudisill and/or [Appellant], who resided within a mile of the accident scene.

The officer then went to the residence, spoke to Mr. Rudisill, who advised that [Appellant] was usually the driver of the vehicle. [Appellant] was present at the residence. He was on the couch or sofa, either asleep or unconscious. The trooper did attempt to arouse [Appellant], which was somewhat difficult to do.

[Appellant] indicated that he was the driver, that he was going to a friend's house, that he had consumed 30 to 40 [c]lonazepam and [two] to [three] Vicodin prior to driving the vehicle. At the time that he was being interviewed by the trooper, the testimony indicated that [Appellant] was unsteady in his movements, he appeared weak and searching for answers. At times he could not sit up or stand, he collapsed onto his knees, and when given water he was unable to hold on to the water bottle or twist open the cap.

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[2] 18 Pa.C.S.A. §§ 5104, 5503; 75 Pa.C.S.A. §§ 3802(d)(2), 3714, and 3745, respectively.

> [Appellant's] moods varied through the course of the interview from cooperative to dazed to agitated. He did in fact suffer an injury to his head, which was evidenced by blood on his face and shirt and blood on the scene on the wheel at the driver's side of the vehicle. Because of the head injury, no field sobriety test was administered.
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> [Appellant] further indicated that he was suicidal and had left a suicide note on the table, which [was] marked as Juvenile Exhibit 1. He had also written a last will and testament, which [was marked] Juvenile Exhibit 2.
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> The trooper indicated that [Appellant] needed to go to the hospital for medical attention. [Appellant] was then resistant and somewhat belligerent in his comments to the officers. They attempted to cuff him to place him on the stretcher that had arrived with an ambulance. He pulled away from the trooper and a second trooper was needed to restrain him and cuff him in order to place him on the stretcher and take him to the hospital.
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> A blood test was in fact administered, and the lab results have been marked and stipulated to as Commonwealth's Exhibit 1.

Order, 8/30/2012, at 2-5.

On August 16, 2012, the juvenile court found that Appellant had committed the above-referenced offenses, but deferred adjudication and disposition pending a drug and alcohol assessment, psychological evaluation, and preparation of an assessment by juvenile probation. Order, 8/30/2012, at 5-7. On October 11, 2012, the juvenile court adjudicated Appellant delinquent. Order, 10/17/2012, at 8. The court ordered that Appellant be placed at Youth Forestry Camp.[3] ***Id.***

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[3] The juvenile court's disposition imposed additional requirements, including abstaining from drug and alcohol use, being subject to random drug screens, paying fees, completing community service, and attending counseling, among other provisions. Order, 10/17/2012, at 8-9.

On October 19, 2012, Appellant filed a post-dispositional motion, raising a challenge to the weight and sufficiency of the evidence to support the driving under the influence and resisting arrest adjudications. On November 29, 2012, the juvenile court denied the motion. Order, 12/17/2012, at 3.

On December 14, 2012, Appellant filed a notice of appeal. The juvenile court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied. Instead of filing a Rule 1925(a) opinion, the juvenile court relied upon its prior orders to explain its decisions.

On appeal, Appellant challenges the sufficiency of the evidence for his delinquency adjudication for driving under the influence and resisting arrest. Appellant's Brief at 5. When reviewing such a claim:

> our applicable standard of review is whether the evidence admitted at trial, and all reasonable inferences drawn from that evidence, when viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to enable the factfinder to conclude that the Commonwealth established all of the elements of the offense beyond a reasonable doubt. Additionally, when examining sufficiency issues, we bear in mind that: the Commonwealth's burden may be sustained by means of wholly circumstantial evidence; the entire trial record is evaluated and all evidence received against the defendant considered; and the trier of fact is free to believe all, part, or none of the evidence when evaluating witness credibility.

Commonwealth v. Crabill, 926 A.2d 488, 490-91 (Pa. Super. 2007) (internal citations and quotation marks omitted).

Appellant first argues that the Commonwealth did not present sufficient evidence to prove that he drove under the influence. Appellant contends that his admission to taking drugs was insufficient to establish proof beyond a reasonable doubt, because there was no testimony regarding when he took the pills and how soon afterward he drove the vehicle. Because there were no witnesses to Appellant's driving, he argues that there was no evidence to demonstrate his inability to drive safely. Appellant maintains that the crash did not prove that he was incapable of driving safely because the crash was intentional, as evidenced by his suicide note. Further, Appellant argues that his unsteady behavior when interviewed by the state trooper was attributable to his head injury, not to intoxication. Appellant's Brief at 10-12.

The Commonwealth responds that the evidence was sufficient, pointing out that Appellant crashed his car into a retaining wall and that Appellant admitted to taking drugs and driving the car. The trooper observed Appellant to be unsteady and unable to hold or open a water bottle. The trooper believed that, based upon his observations, Appellant was unable to drive safely. The lab report confirmed the presence of clonazepam in Appellant's system. The Commonwealth contends that the question of whether Appellant's crash was the result of his ingestion of drugs or the result of his suicidal intentions was a question of credibility to be determined by the fact-finder. Moreover, credibility pertains to a weight of

the evidence challenge on appeal, which is not raised or argued as such in Appellant's brief. Commonwealth's Brief at 7-9.

Appellant was adjudicated delinquent of section 3802(d)(2), which states:

> An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
>
> > (2) The individual is under the influence of a drug or combination of drugs to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle.

75 Pa.C.S.A § 3802(d)(2). The Commonwealth must prove that Appellant was under the influence of a drug and unable to operate a motor vehicle safely. ***Commonwealth v. Hutchins***, 42 A.3d 302, 307 (Pa. Super. 2012). Expert testimony is not required to prove driving under the influence. ***Commonwealth v. Griffith***, 32 A.3d 1231, 1238 (Pa. 2011).

Sufficient evidence has been found through combinations of police officer observations, witness testimony to unsafe driving, failed sobriety tests, and blood tests showing drugs in the driver's system. ***Id.*** at 1240. We also have found sufficient evidence where officers testified to their observations of the appellant, found drugs in the car, and the appellant confessed to smoking marijuana the day of the accident. ***Hutchins***, 42 A.3d at 308. The facts of this case are similar to ***Hutchins***.

In the instant case, Mr. Davis testified that he heard a commotion and went into his yard to find a vehicle stuck on a rock retaining wall about two

feet from his house. N.T., 8/16/2012, at 4. The car was approximately 100 to 150 yards from the road. ***Id.*** Appellant admitted that he consumed Clonazepam and Vicodin prior to driving to a friend's house. ***Id.*** at 10-11. Blood tests confirmed that Appellant had Clonazepam in his system. ***Id.*** at 15-16. While speaking with Trooper Loughner, Appellant was unsteady, did not have the strength to sit up or stand up, fell to his knees when trying to stand, could not hold or open a bottle or water, seemed dazed and became agitated. ***Id.*** at 11-12. Trooper Loughner testified to his training and experience with driving under the influence cases. ***Id.*** at 7-8. The trooper concluded from his observations that Appellant was under the influence of narcotics. ***Id.*** at 11. Trooper Loughner also concluded that, based upon his observations and experience, Appellant was not capable of safely operating a vehicle. ***Id.*** at 17. Viewed in the light most favorable to the Commonwealth, the evidence was sufficient to prove that Appellant was under the influence and incapable of safe driving.

Appellant next contends that the evidence was insufficient to sustain his adjudication for resisting arrest. Appellant concedes that the troopers were discharging a lawful duty by taking him for a blood test following his admission to ingesting clonazepam. However, Appellant argues that there was no evidence that he created a substantial risk of bodily harm or that substantial force was required to overcome his resistance. Appellant contends that he attempted to squirm away from the troopers, but did not

strike or injure them. Appellant argues that two troopers handcuffing him does not constitute substantial force. Appellant's Brief at 12-14.

The Commonwealth responds that Appellant refused to cooperate with the troopers. There was testimony that Appellant tensed his arms, pulled away, and prevented Trooper Loughner from handcuffing him. The Commonwealth maintains that the testimony that force was required was sufficient to prove that Appellant resisted arrest. Commonwealth's Brief at 10-12.

Resisting arrest is defined as follows:

> A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa.C.S.A. § 5104. Instantly, the Commonwealth does not contend that the "substantial risk of bodily injury" prong is applicable to the present scenario. The issue is whether there was sufficient evidence to show that the troopers were required to use substantial force to overcome Appellant's resistance.

"The statute . . . does not require the aggressive use of force such as a striking or kicking of the officer." ***Commonwealth v. Miller***, 475 A.2d 145, 146 (Pa. Super. 1984). The officer does not have to be injured for a resisting arrest conviction. ***Commonwealth v. Butler***, 512 A.2d 667, 673 (Pa. Super. 1986). However, a "minor scuffle incident to an arrest" is not

resisting arrest. ***Commonwealth v. Rainey***, 426 A.2d 1148, 1150 (Pa. Super. 1981) (quotation marks omitted).

We have found no cases factually on all fours with this case. However, a brief examination of a few recent cases illuminates the typical resisting arrest scenarios. When multiple officers were required to apprehend an appellant, and the appellant was tasered before being handcuffed, we found the evidence to be sufficient to prove resisting arrest. ***Commonwealth v. McDonald***, 17 A.3d 1282, 1286 (Pa. Super. 2011). We found sufficient evidence when a struggling and squirming appellant was restrained by two officers and had to be lifted into a police car. ***Miller***, 475 A.2d at 147. We have found sufficient evidence for resisting arrest when an appellant cursed at the police officer, told him to "get off," and struck the officer with his shoulders while the officer struggled to remove the appellant's hand from his pocket. ***Commonwealth v. Coleman***, 19 A.3d 1111, 1118 (Pa. Super. 2011). Passive resistance, when an appellant intertwined her limbs with her husband, which required two officers to arrest the appellant and left an officer "exhausted," sufficed to prove "substantial force" was required. ***Commonwealth v. Thompson***, 922 A.2d 926, 928 (Pa. Super. 2007). However, an appellant who merely tried "to shake off the policeman's detaining arm" was not resisting arrest. ***Rainey***, 426 A.2d at 1150. In ***Rainey***, three officers attempted to restrain, handcuff, and place the appellant in a police van while the appellant "attempted to squirm, wiggle, twist and shake his way free of their grasp." ***Id.*** at 1149. The case *sub*

judice is more akin to ***Rainey*** than those in which we have found the evidence to be sufficient.

Here, the evidence demonstrated that Appellant verbally refused to go with Trooper Loughner. Appellant also cursed at the trooper. N.T., 8/16/2012, at 13. Appellant twisted and pulled away from the trooper. ***Id.*** Trooper Loughner and another trooper attempted to restrain Appellant, although Appellant tensed his arms and pulled away his hand. ***Id.*** at 13-14. Trooper Loughner testified that force was required to handcuff Appellant. ***Id.*** at 14.

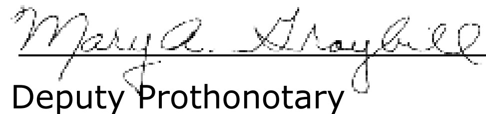
Even viewing the evidence in the light most favorable to the Commonwealth, there is insufficient evidence to prove that "substantial force" was required to overcome Appellant's resistance. While Appellant was not cooperative, Appellant did not strike, kick, or hit any trooper. There was no testimony that substantial force was used or needed. There was no evidence presented to prove that it took exhausting efforts to overcome Appellant's resistance. Twisting or pulling away requires less force to overcome than was required in cases where we have found sufficient evidence for resisting arrest. ***See Coleman***, ***McDonald***, ***Thompson***, and ***Miller***, *supra*. Rather, this case appears to involve a "minor scuffle incident to an arrest." ***See Rainey***, *supra*.

Finding the evidence insufficient, we vacate Appellant's adjudication of delinquency for resisting arrest. As it is unclear which portion, if any, of

Appellant's disposition was attributable to the resisting arrest charge, we remand this case for the juvenile court to enter a new dispositional order.

Adjudication affirmed in part, vacated in part. Dispositional order vacated. Remand case for further proceedings in accordance with this memorandum. Jurisdiction relinquished.

Judgment Entered.



Deputy Prothonotary

Date: 9/17/2013