

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

MICHELLE CICCO

Appellant

No. 101 WDA 2013

Appeal from the Judgment of Sentence December 11, 2012
In the Court of Common Pleas of Westmoreland County
Criminal Division at No(s): CP-65-CR-0003784-2011

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and OTT, J.

MEMORANDUM BY LAZARUS, J.

FILED AUGUST 22, 2013

Michelle Cicco appeals from the judgment of sentence imposed by the Court of Common Pleas of Westmoreland County, following her conviction for driving under the influence of alcohol (DUI)¹ and endangering the welfare of children.² After careful review, we affirm.

On the morning of August 20, 2011, Michelle Cicco left her home with her two children to go to the air show at the Latrobe Airport. N.T. Trial, 12/11/12, at 73. After the air show, Cicco went to a local Sheetz gas station and convenience store to have her car washed; Tonya Pillado was working the cash register. Cicco became increasingly belligerent and agitated toward

¹ 75 Pa.C.S. § 3802(a)(1).

² 18 Pa.C.S. § 4304(a)(1).

Pillado, and eventually started shouting at her. ***Id.*** at 29. Stacey Moff, another patron, recognized Cicco's belligerent and angry behavior as that of someone under the influence of alcohol, as she was a recovering alcoholic herself. Concerned about the two children in Cicco's car, Moff called the police. Cicco got in line for the car wash, and was still in line when Officers Michelle Preston and Michael Wigand arrived in separate vehicles. Moff identified Cicco to Officer Preston as the woman she encountered inside Sheetz. ***Id.*** at 38. Officer Preston spoke with Cicco, observing that her speech was slightly slurred and that it took Cicco a while to produce her driver's license. ***Id.*** at 42. Officer Preston verified the license was valid and returned it to Cicco. Officer Preston then returned to Officer Wigand's patrol car to consult with him. ***Id.*** at 44. Meanwhile, Cicco drove out of the Sheetz lot. Officer Preston did not think that she had enough information to cite Cicco, but wanted to make sure she was driving safely so she followed her for a few blocks.

Officer Preston observed Cicco drive over the yellow line several times, and make several turns bringing her in a circle as if she was trying to elude the police. At one point, Cicco failed to yield to oncoming traffic when making a turn and nearly caused an accident. Cicco crossed into the opposing lane of travel, and Officer Preston decided to stop Cicco's vehicle. Officer Preston had her lights on and siren activated for several blocks, and Cicco failed to stop at a stop sign before Cicco finally stopped her car.

After Officer Preston stopped her vehicle, Cicco again became belligerent. She nearly fell while getting out of her vehicle, and Officer Preston asked her to sit on the curb until backup arrived. Cicco kept her hand on her vehicle when walking to sit on the curb. Officer Preston conducted an HGN test while waiting for backup to arrive, and noted some indicia of alcohol consumption.³ Cicco further threatened to refuse to take other sobriety tests. When Officer Wigand arrived on the scene, Officer Preston asked Cicco to stand up. She attempted to comply, but fell back to the ground immediately. *Id.* at 48. This behavior, in addition to the HGN test, led Officer Preston to believe that Cicco was unable to operate a vehicle safely. She arrested Cicco, and called her husband, Robert Cicco, to pick up the children. *Id.*, at 51-52.

After her arrest, Cicco was brought to the hospital for a blood test. Officer Wigand testified that when he took Cicco out of the enclosed back seat of the police car, there was a strong smell of alcohol. *Id.* at 67. He

³ The Commonwealth Court has explained the horizontal gaze nystagmus (HGN) test as follows:

In an HGN test, the officer observes the driver's eyes to estimate whether the driver's blood alcohol content exceeds the legal limit by observing: (1) the inability of each eye to track movement smoothly, (2) pronounced nystagmus at maximum deviation, and (3) onset of the nystagmus at an angle less than 45 degrees in relation to the center point.

Stancavage v. Department of Transportation, Bureau of Driver Licensing, 986 A.2d 895, 897 n.2 (Pa. Cmwlth. 2009).

further testified that once they arrived at the hospital, Cicco's behavior was erratic, her speech slurred, and her coordination compromised, consistent with a degree of intoxication that would make Cicco unable to safely operate a motor vehicle. *Id.* at 68-69. Cicco refused to submit to a blood test to determine her blood alcohol content (BAC), and the officers then transported her to jail. Cicco was released later the same day.

On December 11, 2012, the court held a one-day non-jury trial. The Commonwealth presented Robert Cicco, Tonya Pillado, Stacey Moff, Officer Preston, and Officer Wigand as witnesses; Cicco testified on her own behalf. The Commonwealth's witnesses testified to their interactions with Cicco. Although Cicco corroborated their testimony regarding her actions, she attributed her behavior to a severe migraine. *Id.* at 74. While the witnesses indicated that the person they encountered was Cicco, not all of the witnesses were specifically asked to identify Cicco in the courtroom during trial.

The court convicted Cicco of one count of driving under the influence and two counts of endangering the welfare of a child. Cicco waived preparation of a pre-sentence investigation report, and the court immediately sentenced her to six months' intermediate punishment with forty days of home electronic monitoring for DUI, and two years' consecutive probation for endangering the welfare of children. Cicco filed a notice of appeal on January 10, 2013, and a concise statement of errors complained of on appeal on January 30, 2013.

Cicco raises one issue on appeal: whether the trial court erred in denying her motion for judgment of acquittal where the Commonwealth failed to adduce sufficient evidence identifying Cicco as the person who was driving the vehicle when the traffic stop occurred.

When determining sufficiency of the evidence claims, we must determine whether the evidence and all reasonable inferences therefrom, viewed in the light most favorable to the verdict winner, was sufficient to enable the factfinder to find every element of the crime charged beyond a reasonable doubt. The Commonwealth may meet its burden of proving every element beyond a reasonable doubt through *wholly circumstantial evidence*, and the factfinder is free to believe all, part, or none of the evidence presented.

Commonwealth v. Sullivan, 864 A.2d 1246, 1250 (Pa. Super. 2004) (emphasis added) (citations omitted). ***See also Commonwealth v. Schmohl***, 975 A.2d 1144, 1148 (Pa. Super. 2007).

Cicco argues that the Commonwealth did not prove beyond a reasonable doubt that she was the person who committed the crime, because the Commonwealth failed to have the witnesses identify her in court. Cicco relies on ***Commonwealth v. Brooks***, 7 A.3d 852, 857 (Pa. Super. 2010), for the proposition that the burden of proof is on the Commonwealth to identify the defendant as the perpetrator of the crimes. While this is true,

[a]ny doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain

its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.

Commonwealth v. Abed, 989 A.2d 23, 26 (Pa. Super. 2010) (emphasis in original).

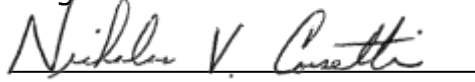
When Tonya Pillado was asked at trial to identify the woman she saw at Sheetz, she identified Cicco, and additionally indicated that Cicco had two children who were with her at Sheetz. N.T. Trial, 12/11/12, at 32. All of the other witnesses indicated that they recognized Cicco as the driver during their testimony. Robert Cicco agreed with counsel when asked if his wife was the defendant, and testified that he picked up his children after his wife's arrest. **Id.** at 11. Moff indicated that Cicco was the woman she saw behaving erratically at Sheetz, and explained that she identified Cicco to police. **Id.** at 36, 38. Officer Preston and Officer Wigand both explained the events of that day, which corroborated Cicco's testimony, thus indicating that Cicco is the woman whom the Officers encountered. **Id.** at 42-52, 65-62, 72-84. While none of the witnesses were present for the entirety of the events leading up to Cicco's arrest, their testimony is consistent with each other's, and with Cicco's testimony, providing a wholly plausible timeline of the day's events, including the identification of Cicco.

There was sufficient circumstantial evidence to establish that Cicco was the driver Officer Preston stopped. Therefore, the Commonwealth met its burden of proof and Cicco is not entitled to relief. **See Commonwealth v. Stays**, 40 A.3d 160, 167 (Pa. Super. 2012) (Commonwealth may sustain burden of proof by wholly circumstantial evidence).

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Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casatti", is written over a horizontal line.

Deputy Prothonotary

Date: 8/22/2013