

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :

Plaintiff :

Vs. :

No. CR-116-2016

SUSAN KELLY, :

Defendant :

Michael S. Greek, Esquire
Matthew Mottola, Esquire

Counsel for Commonwealth
Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - June 2, 2019

Appellant, Susan Kelly (hereinafter "Kelly") was convicted after a bench trial on the charges of Driving Under the Influence¹ and Careless Driving.² After this Court denied post sentencing motions³, Kelly filed this timely appeal. For the reasons stated herein, this Court seeks affirmance from the Appellate Court.

FACTUAL AND PROCEDURAL BACKGROUND

On April 12, 2015, at approximately 2:33 P.M., Officer Tyler

¹ 75 Pa. C.S.A. §3802(d)(2)

² 75 Pa. C.S.A. §3714(a)

³ Kelly's post sentencing motion was comprised of three separate claims: 1) that the Court erred by allowing Officer Tyler Meek to render an opinion regarding any impairment of Kelly by use of her prescription medication; 2) that the Court erred in allowing Trooper Shawn Noonan, a drug recognition expert, to testify regarding Kelly's performance in the VGN & HGN tests; and 3) that the verdict was against the weight of the evidence. These are the same claims Kelly raises on her appeal.

Meek (hereinafter "Meek") was dispatched to the McDonald's parking lot in Mahoning Township, Carbon County, Pennsylvania for a motor vehicle accident. During the course of his investigation, Meek observed damage to the front of a red Mini-Cooper driven by Kelly and damage to the rear of the vehicle in front of Kelly.

Meek concluded that the Mini-Cooper struck the other vehicle. Upon confronting the driver of the Mini-Cooper, Meek noticed that she, Kelly, appeared confused and disoriented⁴, had very glossy eyes and had trouble standing without holding onto her vehicle.⁵ In order to determine whether to contact a D.R.E.⁶, Meek employed an investigative tool known as the HGN test. Kelly nearly fell over several times during this test prompting Meek to stop the test before it was completed. According to Meek, Kelly told him that she took pain medication before she left the house to drive to McDonalds, medication that Meek learned was prescribed after a dental procedure two weeks earlier.

Upon completing his investigation, Meek believed it was necessary and appropriate to contact a D.R.E. based upon his

⁴ On cross-examination, Meek elaborated on Kelly's confusion by stating that she did not know what time it was nor what day it was.

⁵ At no time during the course of the investigation did Kelly ever express that she had a medical condition that caused her to have balance issues.

⁶ A "D.R.E." is a "Drug Recognition Expert;" a police officer trained in identifying people whose driving is impaired by drugs. In this case, Meek eventually contacted Corporal Shawn Noonan of the Pennsylvania State Police.

investigation to that point. Accordingly, he transported Kelly to a local hospital to meet up with the D.R.E.

In addition to the above being elicited from Meek at trial, he was also permitted to testify that based upon his training and experience, he felt the Kelly was "under the influence of a controlled substance at the time [he] had contact with her." This was objected to by Kelly's counsel as an expert opinion, however, it was permitted by the Court. After overruling this objection, the assistant district attorney then asked the question again, soliciting this response: "Yes, I feel she was and she was incapable of safe driving due to that." (emphasis ours).

Corporal Shawn Noonan (hereinafter "Noonan") of the Pennsylvania State Police, a D.R.E., also testified at trial. After being qualified as such, he testified regarding the twelve step process to determine if a person is capable of safely operating a motor vehicle while under the influence of a controlled substance and then testified as to how he initiated these twelve steps in this case. During the course of Corporal Noonan's testimony, one of the steps he utilized involved the Horizontal Gaze Nystagmus (HGN) test and Vertical Gaze Nystagmus (VGN) test. At that point, defense counsel objected to any testimony on these tests. The Court allowed Noonan to testify as to what he observed, but not as to the ultimate conclusions on the HGN, VGN, or Lack of

Convergence test as part of this step.

Noonan also testified that part of his D.R.E. report, he interviews the person being administered the test. After properly mirandizing Kelly, he elicited the following information: 1) Kelly took a Xanax before leaving the house for tooth pain; 2) Kelly took Hydrocodone earlier in the morning that day; 3) that she struck the other vehicle from behind as she was unable to stop after it had started and abruptly stopped; and 4) the date of the incident was Sunday and the present time was 1:00 P.M.⁷ Noonan also testified to various observations he made of Kelly which were part of the D.R.E. exam including: lethargy, reddening of conjunctiva, an impaired perception of time, general confusion, constricted pupils and the lack of reaction to a light stimuli. Noonan explained that each of these observations, based upon his training and experiences, can be conditions caused by the use of a central nervous system depressant such as Xanax or a narcotic analgesic such as Hydrocodone.

Admitted into evidence, without objection from the defense, was Commonwealth Exhibit 2, a copy of Noonan's "drug influence report" based upon his administering of this test to Kelly. Noonan's ultimate expert opinion as identified in this exhibit was

⁷ The time of the interview of Kelly by Noonan was 3:00 P.M. and it was a Monday, not a Sunday.

that "Susan Kelly is incapable of safe driving and is under the influence of a central nervous system depressant and a narcotic analgesic." Noonan's report goes on to state his reasons for this opinion, namely, on the use of a central nervous system depressant - ptosis, general confusion, marked reddening of conjunctiva, subject statement and impaired perception of time and on the use of a narcotic analgesic - constricted pupils, little or no reaction to light, lethargic, slow and low raspy speech. As a result, Noonan recommended that Kelly be subject to a blood draw⁸ to confirm the presence of these substances in her system and to also further his opinion rendered in this report⁹ that those substances impaired her ability to drive safely.

Kelly also took the witness stand. She testified as to multiple health issues required her to take prescribed medications. On the date in question, she testified that around 6:00 A.M., she took a Xanax and a Vicodin.¹⁰ She recalled driving the 20-25 minutes from her home to McDonald's in Mahoning Township for a milkshake and to rear-ending another vehicle. Kelly further

⁸ The results of the blood draw were ultimately suppressed pursuant to *U.S. v. Birchfield*, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016).

⁹ Interestingly enough, in Noonan's report, under step 4, eye examination, Noonan noted relative to the HGN and VGN tests that "due to her inability to follow the stimulus, I was unable to make a determination and additionally on the lack of convergence test "she was either unable to follow directions or unable to follow the stimulus." No where in this report is there reference to a conclusion on any of these three tests.

¹⁰ Vicodin is the generic name for Hydrocodone.

testified that the other driver was "beating on her car" resulting in an elevation of her anxiety levels. In response, she claimed she immediately took two Xanax pills. She also testified that based upon the actions of the other driver in frightening her, causing her anxiety to increase, she "actually needed medical attention."

Meek was called as a rebuttal witness and testified that Kelly never mentioned taking two Xanax immediately after the accident, never requested medical attention, and did not complain that the other driver was frightening her or banging on her car. Noonan also testified as a rebuttal witness. He stated that during his mirandized interview with Kelly, she told him that she took her Xanax before she left the house because she was anxious about driving as it was the first time she was driving after she has her teeth pulled. Noonan also testified that this was the only mention by Kelly of the ingestion of Xanax that day.

After all the testimony was concluded and arguments made by counsel, this Court found Kelly guilty of the D.U.I. charge as well as the summary offense of Careless Driving. On December 14, 2018, Kelly was sentenced on the D.U.I. charge to a period of six (6) months in the County Intermediate Punishment Program with sixteen (16) days in a Qualified Restrictive Intermediate Punishment Program (home electronic monitoring). Various

conditions were also placed on this sentence. On the Careless Driving charge, Kelly was sentenced to a \$25.00 fine and costs.

On December 20, 2018, Kelly filed a timely post sentencing motion in which she claimed that the Court erred: 1) by allowing Officer Meek to opine that Kelly was impaired by her prescription medications to the point where she could not drive safely; and 2) by allowing Corporal Noonan's testimony on Kelly's performance on the HGN and VGN tests. Kelly also argued that the verdict was against the weight of the evidence. On March 29, 2018, this Court summarily denied this post sentencing motion.

On April 2, 2019 a notice of appeal was filed. By order of Court dated April 3, 2019, Kelly was directed to file a concise statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925. On April 15, 2019, Kelly filed her concise statement which consisted of three issues identical to those raised in the post-sentence motion. Those errors are:

1. Whether the Trial Court erred by allowing a police officer, whom was not offered as an expert witness, to testify to his opinion on whether Ms. Kelly was impaired by her prescription medications to the point where she could not drive safely?
2. Whether the Trial Court erred by allowing testimony on any aspect of Ms. Kelly's performance on the HGN, VGN, or Lack of

Convergence field sobriety tests without evidence establishing that these tests have gained general acceptance in the scientific community; and

3. Whether the Trial Court's finding that Ms. Kelly was impaired by her prescription medications to the point where she could not drive safely for the offense of Driving under the influence - Controlled Substance, Impaired Ability (75 Pa.C.S.A. §3802(d)(2)) was against the weight of the evidence.

We will now address each claim seriatim.

LEGAL DISCUSSION

I. OFFICER MEEK'S "EXPERT" OPINION

Kelly's first claimed error was that the Court erred by allowing Meek, a lay witness, to testify to his opinion on whether Ms. Kelly was impaired by her prescription medications "to the point where she could not drive safely." (emphasis ours).

Kelly, however, mischaracterizes the discussion between the Court and Counsel on this issue at trial and has erred in describing what the Court allowed Meek to testify to based upon the questions asked by the A.D.A. Further, Kelly did not object when Meek gratuitously added to his lay opinion testimony, which is the crux of this perceived error.

At trial, the following discussion and colloquy took place:

Q. Okay, And based upon your education, your training and experience with suspected drivers being under the influence of a controlled substance and your observations of the Defendant at the time that you had her out of the vehicle, do you have an opinion whether she was under the influence of a controlled substance at the time you had contact with her?

MR. MOTTOLA: I would object to an expert conclusion, Your Honor.

MR. GREEK: I think I laid a foundation on how many times he has seen individuals that he suspected and how many arrests he made.

THE COURT: Well, I believe that based on his training and experience, he does not need to be an expert to render such an opinion. As a police officer, he has that ability, or else he wouldn't be making arrests. Overruled.

BY MR. GREEK:

Q. Do you have an opinion on whether she was under the influence of a controlled substance at the time that you had contact with her?

A. Yes, I feel she was and she was incapable of safe driving due to that.

Q. And at any point, was Susan Kelly placed then under arrest?

N.T. Bench Trial, 8/14/18, at 13.

As noted from the above exchange, the Assistant District Attorney did not inquire of Meek whether any opinion he had about Kelly being under the influence of a controlled substance also resulted in her being incapable of safe driving. This same question was repeated almost verbatim after the objection was overruled, however that is when Meek himself added that he felt "she was incapable of safe driving due to [being under the influence of a controlled substance]." Kelly did not object nor seek to strike that portion of Meek's testimony.

While the questioning by the Assistant District Attorney was not entirely clear as to the context in which it was being asked, it was clarified in the response to Kelly's objection when the Assistant District Attorney stated that the opinion Meek was rendering dealt with his decision to make an arrest not the ultimate decision on the issue of guilt. This is further supported by the Court believing the same and commenting as it did in stating that Meek did not need to be an expert to render such an opinion on Kelly being under the

influence of a controlled substance to make an arrest based upon my training and experience.

Notwithstanding, it is necessary to review Pennsylvania Rule of Evidence 701, Opinion Testimony by a Lay Witness, in the context of Meek's testimony. Rule 701 limits lay witness testimony in the form of an opinion to one that is:

- (a) Rationally based on the witness's perception;
- (b) Helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) Not based on scientific, technical or other specialized knowledge within the scope of 702.

Pa. Rule of Evidence 701.

Here, Meek was testifying from his own observations and perceptions of Kelly's actions and that testimony was helpful to that Court in understanding Meek's testimony and it was not based upon any scientific, technical or other specific knowledge, but rather on his own training and experience.

In *Commonwealth v. Griffith*, 32 A.3d 1232 (Pa. 2011), the Pennsylvania Supreme Court refused to read into §3802 (d)(2) a mandatory requirement that expert testimony was required to establish that a driver's inability to drive safely was caused by his ingestion of a drug, even if a prescription drug. *Id* at 1238. Further, in *Commonwealth v. Gause*, 164 A.3d 532 (Pa. Super. 2017),

the court held that it was permissible for a lay witness to form an opinion based upon his or her rationally based perceptions.

Thus, Meek did not testify as an expert and did not provide an expert opinion. Even if Meek was improperly permitted to testify as an expert as Kelly claims, we believe its admission into evidence would be harmless error in light of the expert opinion rendered by Corporal Noonan on the same issue and the other evidence establishing the Defendant's guilt.

II. ADMISSION OF HGN, VGN, LACK OF CONVERGENCE EVIDENCE

Kelly next argues that the Court erred in allowing certain testimony from Corporal Shawn Noonan, a Drug Recognition Expert on the results of Kelly's performance on the HGN, VGN and Lack of Convergence tests without evidence that these tests have gained general acceptance in the scientific community.

The following discussions took place at trial:

Q. Okay, Now, there's been an objection relating to the HGN test and the Vertical Gaze Nystagmus. But you did testing with regard to a stimulus?

A. I did. I just asked if she -- I had her -- to see if she could follow a stimulus. In this case, it was my finger.

Q. Was she able to follow it?

case that says VGN or lack of convergence or parts of step four besides the HGN are treated similarly. They are similar testing involving following a stimulus with the eyes and using the results of that to conclude someone is under impairment. I think they are similar tests and should be treated similar.

MR. GREEK: Your Honor, my point is he is not using that HGN test as a determinative factor that this individual was under the influence of a controlled substance. It is a factor of the drug recognition report. I am only asking him to testify as to her ability to follow his finger with her eyes.

THE COURT: But isn't he ultimately going to decide when he renders his expert opinion that based upon all of the 12 steps, which would include this, that she may be under the influence of a controlled substance?

MR. GREEK: Your Honor, may I approach? May we approach? I just want to have something off the record. (Whereupon, an off-the-record discussion was held.)

THE COURT: Anything else you want to put on the record with regard to the objection?

MR. MOTTOLA: No, Your Honor.

THE COURT: Or your position to the objection?

MR. GREEK: No, Your Honor.

THE COURT: I am going to allow Corporal Noonan to testify regarding what he observed, but not his ultimate conclusions on the HGN, VGN or lack of convergence.

MR. GREEK: You are going to allow him to testify as to what he observed?

THE COURT: Yes, but not what impact or what result as a result of those observations he made, on just that factor, that step.

MR. GREEK: Okay.

BY MR. GREEK:

Q. Did you have the opportunity as part four of your eye examination to observe Susan Kelly's eyes?

A. I did.

Q. And can you comment on what you observed with regard to her and her eyes and her ability to follow a stimulus while you were performing the evaluation?

A. Yes, I am trying to say this without saying other stuff. A precursor for later tests is to ensure that a person is able to follow my finger as I slowly move it back and forth, side to side. In this case, my finger was the stimulus. I raised it in front of her face and asked her if she could follow my finger as I moved it

verdict shocks one's sense of justice. *Commonwealth v. Widmer*, 560 Pa. 308, 318-20, 744 A.2d 745, 751-52 (2000); *Commonwealth v. Champney*, 574 Pa. 435, 443-44, 832 A.2d 403, 408-09 (2003). On review, an appellate court does not substitute its judgment for the finder of fact and consider the underlying question of whether the verdict is against the weight of the evidence, but, rather, determines only whether the trial court abused its discretion in making its determination. *Widmer*, 560 Pa. at 321-22, 744 A.2d at 753; *Champney*, 574 Pa. at 444, 832 A.2d at 408.

Commonwealth v. Lyons, 79 A.3d 1053, 1067 (Pa. 2013), cert. denied, 134 S. Ct. 1792 (U.S. 2014).

Our Supreme Court has long recognized that,

[b]ecause the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

This does not mean that the exercise of discretion by the trial court in granting or denying a motion for a new trial based on a challenge to the weight of the evidence is unfettered. In describing the limits of a trial court's discretion, we have explained[,] [t]he term "discretion" imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused where the course pursued represented not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill-will.

Commonwealth v. Clay, 64 A. 3d 1049, 1055 (Pa. 2013)
(citations and emphasis omitted).

"The trier of fact while passing on the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence." *Commonwealth v. Andruliewicz*, 911 A.2d 162, 165 (Pa. Super. 2006).

In the case *sub judice*, ample evidence pointed to the guilt of Kelly including Noonan's uncontroverted and unchallenged expert opinion. Kelly's testimony was often incredulous and contradicted by the Commonwealth witnesses. This Court finds not only that the Commonwealth's witnesses were more credible than Kelly, but that the weight of their testimony led to only one conclusion: that Kelly was guilty of violating 75 Pa.C.S.A. §3802(d)(2).

CONCLUSION

Based upon the foregoing, this Court would respectfully request that the Superior Court affirm the judgement of sentence.

BY THE COURT:


Joseph J. Matika, J.