

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION - LAW

COMMONWEALTH OF PENNSYLVANIA, :
 :
 v. : No. CR-304-2022
 :
 DERICK JOHN CHRIS SMITH, :
 :
 Appellant. :

Brian G. Gazo, Esquire Counsel for Commonwealth
Assistant District Attorney

Eric T. Wiltrout, Esquire Counsel for Appellant
Assistant Public Defender

FILED IN OFFICE
2024 MAY 10 A 11:07
TYRONE BOWEN
CLERK OF COURTS
CARBON COUNTY
PENNSYLVANIA

MEMORANDUM OPINION

Serfass, J. - May 10, 2024

Derick John Chris Smith (hereinafter "Appellant") appeals from this Court's Order of Sentence dated March 25, 2024, which was entered following his conviction on the charge of Driving Under the Influence of a Controlled Substance (75 Pa.C.S.A. § 3802(d)(2)).¹ Appellant challenges the sufficiency of the evidence presented by the Commonwealth to prove that he drove, operated or was in actual physical control of the movement of a motor vehicle while under the influence of a drug or combination of drugs which it impaired his ability to safely drive, operate or be in actual physical control of the movement of said vehicle. We file the following Memorandum Opinion pursuant to Pa.R.A.P. 1925(a), respectfully recommending that the

¹ Defendant was also found guilty and sentenced on the following summary offenses on March 25, 2024: driving at safe speed; reckless driving; and duties at stop signs. He has not challenged his convictions or the sentences imposed relative to the summary offenses.

instant appeal be denied and that the aforesaid Order be affirmed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL HISTORY

Appellant was arrested on January 23, 2021 by Pennsylvania State Police Trooper Mark Bower following a traffic stop which occurred at East Alley and Carbon Alley in the Borough of Lehighton at approximately 3:00 a.m. According to the affidavit of probable cause, in the early morning hours of January 23, 2021, Trooper Bower observed a white SUV which failed to come to a complete stop at the intersection of Summit Avenue and Second Street. Trooper Bower followed the vehicle into a twenty-five (25) miles per hour zone where the vehicle was traveling at thirty-five (35) miles per hour. Trooper Bower initiated a traffic stop and, when he made contact with the Appellant, he observed him to have dilated pupils, slurred speech, and to appear jittery. He also observed that Appellant had sustained an injury prior to the stop and walked with a cane.

Due to these observations, Trooper Bower asked that Appellant exit the vehicle and perform standardized field sobriety tests which were limited to those tests an individual with a cane could perform. During the field sobriety tests, Trooper Bower observed multiple signs of impairment. The trooper also noted that Appellant stated he had taken numerous prescription medications prior to being pulled over. Based on Trooper Bower's experience and training, he determined that Appellant was under the influence and incapable of safe driving.

Trooper Bower asked Appellant to submit to a DRE evaluation and he agreed. After the DRE evaluation was concluded, it was recommended that Appellant undergo a blood test. Appellant refused to submit to a blood test and he was then charged with the following offenses: Count 1 - DUI: Controlled Substance - Impaired Ability - 1st Offense (75 §3802 §§ D2); Count 2 - Driving at a Safe Speed (75 § 3361); Count 3 - Careless Driving (75 § 3714 §§ A); Count 4 - Reckless Driving (75 § 3736 §§ A); and Count 5 - Duties at a Stop Sign (75 § 3323 §§ B). On April 18, 2023, a stipulation was filed pursuant to which Appellant agreed to plead guilty to Count 1 - DUI: Controlled Substance - Impaired Ability - 1st Offense, with the remaining charges to be dismissed.

On June 27, 2023, after the Court was advised that Appellant did not wish to proceed with the guilty plea, an Order was entered striking the guilty plea hearing from the Court's calendar and scheduling the case for a Non-Jury Trial on August 11, 2023. Due to a continuance motion filed by the Commonwealth and granted by the undersigned, the Non-Jury Trial was not convened in this matter until October 20, 2023. On October 27, 2023, this Court entered a Verdict which found Appellant **GUILTY** of Count 1 - DUI: Controlled Substance - Impaired Ability - 1st Offense; **GUILTY** of Count 2 - Driving at Safe Speed; **GUILTY** of Count 3 - Careless Driving; **NOT GUILTY** of Count 4 - Reckless Driving; and **GUILTY** of Count 5 - Duties at a Stop Sign. Defendant was directed to appear for sentencing on November 20, 2023.

Following several non-appearances by Defendant, the issuance of related bench warrants by this Court and the granting of multiple continuances based upon Defendant's failure to complete his pre-sentencing drug and alcohol evaluations, a sentencing hearing was held before the undersigned on March 25, 2024.

On April 12, 2024, Appellant filed an appeal to the Superior Court of Pennsylvania requesting review and reversal of this Court's verdict and the Order of Sentence dated March 25, 2024. Simultaneous with the filing of his appeal, Appellant filed a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b).

ISSUE

1. Was the evidence presented by the Commonwealth sufficient to establish that Appellant drove, operated or was in actual physical control of the movement of a vehicle while under the influence of a drug or combination of drugs to which it impaired his ability to safely drive, operate or be in actual physical control of the movement of the vehicle?

DISCUSSION

It is well-settled law in this Commonwealth that when addressing a challenge to the sufficiency of evidence supporting a conviction, the standard of review is de novo, and the scope of review is limited to the evidence admitted at trial viewed in the light most favorable to the Commonwealth as verdict winner. Commonwealth v. Rushing, 627

Pa. 59, 99 A.3d 416, 420-21 (2014). The reviewing court is to determine "whether the evidence at trial, and all reasonable inferences derived therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all elements of the offense beyond a reasonable doubt." Commonwealth v. May, 584 Pa. 640, 887 A.2d 750, 753 (2005). "The Commonwealth can meet its burden by wholly circumstantial evidence." Commonwealth v. Benito, 133 A.3d 333, 335 (Pa.Super. 2016) (citation omitted).

The factfinder, "while passing on the credibility of the witnesses and the weight of the evidence, is free to believe all, part or none of the evidence." Commonwealth v. Miller, 172 A.3d 632, 640 (Pa.Super. 2017). "In conducting this review, the appellate court may not weigh the evidence and substitute its judgment for the fact finder." Id.

To sustain a conviction for driving under the influence of a controlled substance, the Commonwealth must prove that the defendant/appellant drove, operated or was in actual physical control of the movement of a vehicle while under the influence of a drug or combination of drugs to a degree which impaired his 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). Appellant herein argues that the Commonwealth has failed to present any evidence which established that he was under the influence of a drug or combination of drugs

which impaired his ability to safely drive, operate or be in actual physical control of the movement of a vehicle.

In a case similar to the one now before us, Commonwealth v. Griffith, the defendant was arrested and charged with driving under the influence of a controlled substance, in violation of 75 Pa.C.S.A. § 3802(d)(2). During the bench trial, the Commonwealth presented evidence of impairment, which included the testimony of an eye witness and the testimony of Officer William H. Dillman, who was the arresting police officer in the case. Commonwealth v. Griffith, 32 A.3d 1231, 1234 (Pa. 2011). Officer Dillman testified that the defendant failed three field sobriety tests, had shaky hands, and had difficulty standing. Id. at 1240. Based upon these observations, Officer Dillman requested that the defendant submit to a blood test and he agreed. Id. After the results were returned, the parties stipulated that the Defendant's blood test revealed the presence of multiple medications, for all of which Defendant had a valid prescription. Id. at 1234. Thus, the trial court found the defendant guilty of driving under the influence of a controlled substance in violation of 75 Pa.C.S.A. § 3802(d)(2).

On appeal, the reviewing court concluded that the evidence was insufficient to sustain the conviction because although there was sufficient evidence to establish that that the defendant was incapable of safely operating her vehicle, there was no evidence to establish that defendant's impairment was caused by "a drug or combination of

drugs." Griffith, 985 a.2d at 235, reversed by Griffith, 32 A.3d at 1240. The court found there to be no evidence to establish the impairment because the Commonwealth introduced no expert testimony as to: the pharmacological properties of the drugs the defendant ingested; whether any of the drugs could have impaired the defendant's ability to safely drive; or, whether a combination of the drugs could have impaired the defendant's ability to safely drive. Id. at 1234. The Commonwealth then filed a petition for allowance of appeal which was granted by our Supreme Court. Id. at 1240.

The Pennsylvania Supreme Court held that the focus of Section 3802(d)(2) is not upon the type of evidence introduced, but upon whether the totality of the evidence proved that the defendant's inability to safely drive "was the result of the influence of a drug or combination of drugs." Id. at 1239. The Court then applied the law to the facts of the case and expressly held that the evidence was sufficient to support the defendant's conviction for driving under the influence of a drug or combination of drugs. Commonwealth v. Graham, 81 A.3d 137, 145 (Pa.Super. 2013). Specifically, the Supreme Court held: "An experienced police officer closely observed [the defendant's] behavior, demeanor, unsteadiness, and inability to perform field sobriety tests... [The defendant] admitted taking [the prescription drug Soma] in the morning of the day of her arrest... The Commonwealth's evidence was sufficient to establish, beyond a

reasonable doubt, that Appellee violated subsection 3802(d)(2).” Id. at 1240.

Griffith is directly on point and apposite to the instant case. At the non-jury trial held in this matter on October 20, 2023, the Commonwealth presented the body camera footage from the traffic stop along with the testimony of Trooper Mark Bower and Corporal Micheal Sofranko of the Pennsylvania State Police. Trooper Bower testified that on January 23, 2022, while patrolling Lehighton Borough he observed a white Mercedes SUV fail to come to a complete stop at the intersection of Summit Avenue and Second Street. (N.T. at 6). Trooper Bower also stated that the vehicle was traveling thirty-five (35) miles per hour in a twenty-five (25) miles per hour zone and was observed to have loose shards of material hanging from the right rear bumper. As a consequence, he initiated a traffic stop. Id. Trooper Bower further testified that once he made contact with the driver, who was identified as Appellant, he immediately observed him to have dilated pupils (N.T. at 9). After briefly talking with Appellant, Trooper Bower also stated that he noticed Appellant had slurred speech and appeared very jittery. Id.

Based upon these observations, Trooper Bower asked Appellant to step out of the vehicle so that he could perform standardized field sobriety tests to further his investigation. As Appellant exited the vehicle, Trooper Bower noticed that he had sustained a prior injury which required him to use a cane. (N.T. at 10). Due to Appellant’s

prior injury, Trooper Bower did not conduct any physical field sobriety tests such as the walk and turn test or the one-legged stand test. However, he did have Appellant perform the Modified Romberg Balance Test during which body shakes, eyelid flutters and leg tremors were observed. In his testimony, Trooper Bower stated the Appellant was "kind of staggering and stumbling" while standing and also appeared to have very bloodshot and watery eyes. (N.T. at 11). Trooper Bower also stated that Appellant displayed a low raspy voice, rambled at times, and was very talkative. Id. According to Trooper Bower's testimony, Appellant also admitted that he had taken multiple prescription drugs at 10:30 that evening and had also administered medical marijuana. Id. At this point, Trooper Bower requested that Appellant submit to a drug recognition evaluation and Appellant agreed. (N.T. at 12).

Appellant was transported to the Lehigh State Police Barracks where Corporal Sofranko, a certified drug recognition evaluator, performed a DRE evaluation on Appellant. Corporal Sofranko explained that, as a drug recognition evaluator, part of his job is to ask whether Appellant is currently taking any medications or drugs. (N.T. 41). Corporal Sofranko testified that during the evaluation, Appellant disclosed that he takes the following medications daily: 10 milligrams of Ambien once a day, 75 milligrams of Wellbutrin twice a day, 2 milligrams of Alprazolam twice a day, 75 milligrams of Adderall twice a day and 400 milligrams of Seroquel three times a

day. (N.T. at 42). According to Corporal Sofranko, Appellant also disclosed that on the day of the traffic stop he had smoked marijuana around 9 a.m. and took 30 milligrams of Percocet as well as Lisinopril, which is commonly used for high blood pressure. Based upon the numerous medications consumed, the tests performed and his observations involving Appellant's attitude, cooperation and coordination, Corporal Sofranko testified that at the conclusion of the evaluation he believed Appellant was under the influence of four different categories of drugs, specifically, central nervous system depressants, central nervous system stimulants, narcotic analgesics and cannabis. (N.T. at 64-65).

Pursuant to Griffith, this evidence is sufficient to establish that Appellant was impaired by a drug or combination of drugs to such a degree which would render him unable to safely operate a vehicle. Specifically, an experienced law enforcement officer closely observed Appellant's behavior, demeanor, and clues of impairment which led him to request Appellant submit to a DRE evaluation. Also, on the day of his arrest, Appellant disclosed to the troopers that he had smoked marijuana and had taken Ambien, Wellbutrin, Alprazolam, Adderall, Seroquel, Percocet and Lisinopril. Moreover, Appellant refused to submit to a blood test as requested by Trooper Bower. We note that evidence of an arrestee's refusal to submit to a warrantless blood test may be considered as proof of consciousness of guilt at trial on a charge of driving under the influence. See Commonwealth v. Bell,

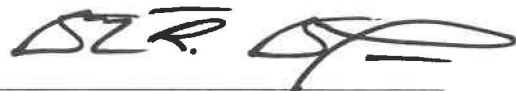
211 A.3d 761 (Pa. 2019) While no presumptions may arise from this evidence, it may be considered along with other factors concerning the charge. 75 Pa.C.S.A. § 1547(e).

When viewed in its totality, the Commonwealth's evidence was sufficient to establish, beyond a reasonable doubt, that on January 23, 2021, Appellant drove his vehicle while he was under the influence of a drug or a combination of drugs to a degree which impaired his ability to safely drive the vehicle in violation of Pa.C.S.A. § 3802(d)(2).

CONCLUSION

Based upon the foregoing, we respectfully recommend that the instant appeal be denied and that our Verdict of October 27, 2023, and the corresponding Order of Sentence dated March 25, 2024, be affirmed accordingly.

BY THE COURT:



Steven R. Serfass, J.