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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 043-SA-2016
	:	
ROLANDO HORSFORD,	:	
	:	
Defendant	:	

Seth E. Miller, Esquire — Counsel for the Commonwealth
Asst. District Attorney
Matthew J. Mottola, Esquire — Counsel for the Defendant
Asst. Public Defender

SUPPLEMENTAL OPINION

Serfass, J. - August 17, 2017

On December 27, 2016, Rolando Horsford, (hereinafter "Defendant"), filed a pro se appeal from the Order of Court entered on December 1, 2016 finding him guilty of violating Pa.C.S.A. §1501(a) and sentencing him to pay a one-thousand-dollar ($1,000.00) fine and to undergo imprisonment in the Carbon County Correctional Facility for not less than forty-five (45) days nor more than ninety (90) days. We file the following Supplemental Opinion in response to Defendant's supplemental 1925(b) statement, pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) and the limited remand order of the Honorable Superior Court filed on June 30, 2017. For the reasons set forth in both our Memorandum Opinion dated February 28, 2017 and this Supplemental Opinion, we respectfully recommend that Defendant's conviction and sentence be affirmed.

FACTUAL AND PROCEDURAL HISTORY

The facts, when viewed most favorably to the Commonwealth as verdict winner, begin on June 8, 2016 when Corporal Shawn Nunemacher of the Lansford Police Department received a call from dispatch concerning an unrelated incident. Corporal Nunemacher testified that while responding to that call, he noticed a Chrysler sedan with tinted windows. Corporal Nunemacher recognized this automobile as the same vehicle from previous traffic stops he had made which also involved Defendant. He recalled that earlier in the year he stopped Defendant and ultimately cited him for operating a vehicle without a valid driver's license. Corporal Nunemacher then followed the vehicle until it stopped at a local convenience store. A few seconds after Defendant parked and the marked police cruiser pulled up behind Defendant's vehicle, Corporal Nunemacher observed Defendant exit the vehicle from the driver's seat. The corporal then watched Defendant walk from his car into the convenience store. At that time, Corporal Nunemacher and his partner proceeded on to the call that they were originally responding to prior to spotting Defendant's vehicle. Later that day, Corporal Nunemacher returned to the Lansford police station, printed a certified copy of Defendant's suspended driver's license, and sent Defendant a traffic citation via the United States Postal Service.

As noted hereinabove, the citation was issued for violating 75 Pa.C.S.A. §1501(a)-driving without a license. The June 8, 2016 citation is Defendant's third violation of 75 Pa.C.S.A. §1501(a)

within the past seven (7) years which triggers enhanced penalties pursuant to 75 Pa.C.S.A. §6503(b). Defendant's prior violations occurred on August 29, 2009, and January 6, 2016, respectively.

On December 1, 2016, a trial *de novo* was held before this Court during which both Corporal Nunemacher and Defendant testified as to their version of the facts surrounding the incident of June 8, 2016. Upon conclusion of the trial, this Court recognized that the disposition of the case turned on the credibility of the witnesses. Ultimately, we determined that Corporal Nunemacher's testimony was most credible and we found Defendant guilty, sentencing him to pay the costs of prosecution and a one thousand-dollar ($1,000.00) fine, and to undergo imprisonment in the Carbon County Correctional Facility for not less than forty-five (45) days nor more than ninety (90) days, pursuant to 75 Pa.C.S.A. §6503(b).

In response to Defendant's appeal from his December 1, 2016 conviction, this Court filed a Memorandum Opinion on February 28, 2017, which addressed the primary issue raised in Defendant's pro se 1925(b) statement: whether his attorney was ineffective as legal counsel leading up to and during the *de novo* trial. On April 11, 2017, the Superior Court granted the withdrawal motion filed by Defendant's trial counsel and directed this Court to determine Defendant's eligibility for court appointed counsel. After conducting a hearing on the matter, we determined that Defendant was eligible for such counsel and Assistant Public Defender Matthew J. Mottola, Esquire was appointed as Defendant's attorney on May 16, 2017.

On July 19, 2017, with the aid of Attorney Mottola, Defendant filed a "Supplemental Concise Statement of Errors Complained of on Appeal" which contained the following two (2) additional issues for appellate review:

1. Whether the statutory scheme of 75 Pa.C.S.A. §1501 and 75 Pa.C.S.A. §6503(b) violate Defendant's due process rights pursuant to both the United States and Pennsylvania Constitution because the scheme, in effect, only provides Defendant with the procedural protections afforded to someone charged with a summary offense even though Defendant faced a period of incarceration of a misdemeanor offense; and
2. Whether there was sufficient evidence to establish Defendant was driving the vehicle pursuant to 75 Pa.C.S.A. §1501.

DISCUSSION

Having previously addressed the issue of ineffective assistance of counsel which was raised in Defendant's pro se Pa.R.A.P. 1925(b) statement, we will now address seriatim the issues raised in Defendant's supplemental statement.

I. Due Process

While violations of 75 Pa.C.S.A. §1501(a) are categorized as summary offenses, 75 Pa.C.S.A. §6503(b) subjects a repeat offender of 75 Pa.C.S.A. §1501(a) to a sentence of a fine not less than two hundred dollars ($200.00) nor more than one thousand dollars ($1,000.00) or to imprisonment for not more than six (6) months, or both. Defendant avers that this statutory scheme violates his due

process rights under both the United States and Pennsylvania Constitutions. Based on the Pennsylvania Crimes Code, 18 Pa.C.S.A. §101, et seq., an offense constitutes a summary offense if it is so designated or if a person convicted thereof may be sentenced to a term of imprisonment, the maximum of which is not more than ninety (90) days. 18 Pa.C.S.A. §106(c). Conversely, a misdemeanor of the third degree is a crime as designated or one for which a person who has been convicted may be sentenced to a term of imprisonment, the maximum of which is not more than one (1) year. 18 Pa.C.S.A. §106(b)(8). Therefore, second or subsequent violations of section 1501(a) of the Vehicle Code, governed by 75 Pa.C.S.A. §6503(b), would seemingly be classified as misdemeanors of the third degree because the maximum possible term of imprisonment exceeds ninety (90) days.

However, the legislature has expressly provided in the Vehicle Code that the Crimes Code, "insofar as it relates to fines and imprisonment for convictions of summary offenses, is not applicable to this title." 75 Pa.C.S.A. §6502(c). Instead, the Vehicle Code provides:

> It is a summary offense for any person to violate any of the provisions of this title unless the violation is by this title or other statute of this Commonwealth declared to be a misdemeanor or felony.

75 Pa.C.S.A. §6502(a). As the language of section 6503(b), establishing the maximum sentence to be imposed for a second or subsequent offense, does not declare a second or subsequent offense

to be a misdemeanor or a felony, and as there is no other statute which expressly declares that a second or subsequent conviction for violating 75 Pa.C.S.A. §1501(a) is to be deemed a misdemeanor or felony, the provisions of 75 Pa.C.S.A. §6502(a) and (c) would seem to declare the legislative intent to be (1) that a violation of 75 Pa.C.S.A. §1501(a), whether a first, second or subsequent offense, shall be deemed a summary offense, and (2) that provisions of the Crimes Code establishing summary offenses according to maximum penalties to be imposed are to have no application to violations of 75 Pa.C.S.A. §6503. "Violations of the Vehicle Code shall be summary offenses unless otherwise expressly classified by statute." Commonwealth v. Lyons, 576 A.2d 1105, 1106 (Pa. Super. 1990).

Since second or subsequent convictions for violations of 75 Pa.C.S.A. §1501(a) are summary offenses with a possible sentence of incarceration not to exceed six (6) months, this statute falls within the purview of Baldwin v. New York, 399 U.S. 66 (1970), which requires that a defendant be given the option of a jury trial only if he faces a sentence of incarceration which exceeds six (6) months. Because 75 Pa.C.S.A. §6503(b) merely subjects Defendant to a possible sentence of not more than six (6) months incarceration, he is not entitled to a jury trial as his maximum possible sentence cannot exceed six months of imprisonment. Commonwealth v. Sperry, 577 A.2d 603, 606 (Pa. Super. 1990).

Therefore, even though the enhanced penalties for second or subsequent 1501(a) convictions, as set forth in 75 Pa.C.S.A. §6503(b),

could be classified as misdemeanor-grade sentences under the Crimes Code due to the maximum sentence which exceeds ninety (90) days, a review of 75 Pa.C.S.A. §6502(a), coupled with the settled caselaw of this Commonwealth, leads to the inescapable conclusion that 75 Pa.C.S.A. §1501(a) is a summary offense and that it remains so notwithstanding the penalty enhancements of 75 Pa.C.S.A. §6503(b). Accordingly, Defendant was afforded his full due process rights as his case was heard *de novo* by the undersigned sitting without a jury pursuant to Pa.R.Crim.P. 462(A). Defendant was not entitled to a jury trial since his maximum possible sentence could not exceed six months of incarceration.

II. Evidence Establishing Defendant Drove the Vehicle

Defendant next avers that there is insufficient evidence to establish that he was driving the Chrysler sedan on June 8, 2016. For this Court to find that Defendant violated 75 Pa.C.S. § 1501(a), the Commonwealth must prove every element of the crime beyond a reasonable doubt. Commonwealth v. Thomas, 867 A.2d 594 (Pa. Super. 2005). "This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt." Id. at 597. Id quoting Commonwealth v. Coon, 695 A.2d 794, 797 (Pa. Super. 1997). Moreover, the Commonwealth Court has opined that an officer's testimony that he witnessed the driver exit the subject vehicle is a significant factor in determining whether a given

defendant drove a motor vehicle. Castro v. Commonwealth, 462 A.2d 928 (Pa. Cmwlth. 1983) (In that license suspension and DUI case, the Commonwealth Court determined that the officer's testimony that he saw the licensee get out of the vehicle, coupled with damage to several parked cars and other factors, was sufficient to find that the defendant drove the vehicle).

In the case at bar, Corporal Nunemacher recognized Defendant's vehicle from a previous traffic stop in which Defendant was cited for operating a vehicle without a valid license. The corporal then followed the vehicle, pulled up behind it, and observed Defendant exit from the driver's seat. After proceeding on to a higher priority call, Corporal Nunemacher printed a certified copy of Defendant's suspended driver's license and issued Defendant a traffic citation.

At the *de novo* trial held before this Court on December 1, 2016, Defendant testified that the police could not have seen him exit the vehicle because the police cruiser was not parked behind his vehicle when Defendant exited that vehicle. Defendant claims that the police cruiser did not enter the convenience store parking lot until Defendant and his brother were inside the convenience store. Because Defendant's statement that the officer could not have seen him exit the vehicle is in direct conflict with Corporal Nunemacher's testimony that he personally observed Defendant exit the vehicle from the driver's seat, this Court must make a credibility determination. Here we note that questions of credibility and the resolution of testimonial conflicts are for the trial court to determine. McMahon

v. Commonwealth, 395 A.2d 318 (Pa. Cmwlth. 1978). Ultimately, we find Corporal Nunemacher's testimony to be most credible. Since Defendant exited the vehicle from the driver's seat mere seconds after the vehicle was parked, the most logical conclusion is that Defendant was the driver of the vehicle.

Therefore, based on the credible testimony of Corporal Nunemacher, there is sufficient evidence to prove beyond a reasonable doubt that Defendant drove the vehicle in question.

CONCLUSION

For the foregoing reasons, we respectfully recommend that Plaintiff's appeal be denied and that our Order of Court dated December 1, 2016, finding Defendant guilty of violating 75 Pa.C.S.A. §1501 and sentencing him to pay a fine of one thousand dollars ($1,000.00) and to undergo imprisonment in the Carbon County Correctional Facility for not less than forty-five (45) days nor more than ninety (90) days, be affirmed accordingly.

BY THE COURT:

Steven R. Serfass, J.