NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
GERALD F. STRUBINGER,	:	
	:	
Appellant	:	No. 1993 EDA 2013

Appeal from the Judgment of Sentence June 17, 2013
In the Court of Common Pleas of Carbon County
Criminal Division No(s).: CP-13-SA-0000031-2013

BEFORE: ALLEN, JENKINS, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED MARCH 25, 2014**

Appellant, Gerald F. Strubinger, appeals *pro se* from the judgment of sentence entered in the Carbon County Court of Common Pleas, after he was convicted of exceeding the speed limit by ten miles per hour.[1] Appellant asserts that the court's finding that he was the driver of the vehicle was against the weight of the evidence. We affirm.

The facts regarding the underlying traffic offense have been summarized by the trial court and need not be reiterated here. ***See*** Trial Ct. Op., 9/13/13, at 1-3. It suffices to note here that the arresting officer, Pennsylvania State Trooper Anthony Kingsley, used the "TRACS" computer

* Former Justice specially assigned to the Superior Court.

[1] 75 Pa.C.S. § 3362(a)(3).

system to issue a citation at the time of the traffic stop on November 19, 2012. However, that citation listed the owner of the subject vehicle, Appellant's son Gregory, as the driver committing the offense. Nine days later, on November 28, 2012, the trooper prepared a new citation listing Appellant as the driver of the vehicle, after Appellant's son called to complain about the initial citation.

Appellant was found guilty in the magisterial district court on April 16, 2013. He appealed that decision and proceeded to a trial *de novo* in the Court of Common Pleas on June 17, 2013. The trial court found him guilty and ordered him to pay a fine of $45, as well as costs and fees. This timely appeal followed.[2]

Appellant, in his *pro se* brief to this Court, raises a single challenge to the weight of the evidence identifying him as the driver at the time of the traffic stop.[3] Appellant's Brief at 6. He observes that the trooper failed to identify him in the citation prepared at the time of the traffic stop and that the Commonwealth failed to adduce additional evidence to support the trooper's testimony that Appellant was the driver. ***Id.*** at 14-17. He further

[2] Appellant complied with the trial court's order to file a Pa.R.A.P. 1925(b) statement, and the trial court filed a responsive opinion.

[3] Appellant, within his challenge to the weight of the evidence, also claims that the trooper's testimony was so unreliable that it should not have been admitted at trial. Appellant's Brief at 14-17. However, Appellant did not object to the admissibility of the trooper's testimony at trial. Therefore, Appellant's evidentiary claim is waived. ***See*** Pa.R.A.P. 302(a).

asserts that he presented credible evidence that he sleeping at the time of the traffic stop and that the trooper's testimony was not credible.[4] ***Id.*** at 18-19, 21-22. No relief is due.

Our standard of review is well-settled:

> The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses.
>
> As an appellate court, we cannot substitute our judgment for that of the finder of fact. Therefore, we will reverse a jury's verdict[5] and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice. A verdict is said

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[4] We note that Pa.R.Crim.P. 607 requires that a weight of the evidence challenge be raised in a motion for a new trial (1) orally, on the record, before sentencing, (2) by written motion before sentencing, or (3) in a post-sentence motion. ***See*** Pa.R.Crim.P. 607(A). Pennsylvania Rule of Criminal Procedure 720(D), however, prohibits the filing of post-sentence motions following a trial *de novo*. Pa.R.Crim.P. 720(D).

This Court has observed that it is unjust to deprive a defendant of the opportunity to challenge the weight of the evidence for failing to file a motion that he is not entitled to file. ***See Commonwealth v. Dougherty***, 679 A.2d 779, 784 (Pa. Super. 1996). The ***Dougherty*** Court further declined to find waiver where the trial court considered the weight of the evidence by addressing the credibility and weight of evidence at the close of a defendant's trial *de novo*. ***Id.*** at 784-85.

Instantly, Appellant did not expressly request a new trial prior to sentencing. However, under ***Dougherty***, we find that Appellant's weight of the evidence challenge has not been waived. ***See id.***; ***see also*** N.T., 6/17/13, at 51 (indicating trial court addressed credibility and weight of evidence at close of trial *de novo*).

[5] It is well settled that the "the trial court's verdict must be accorded the same legal effect as a jury verdict." ***Commonwealth v. Robinson***, 33 A.3d 89, 94 (Pa. Super. 2011) (citation omitted).

> to be contrary to the evidence such that it shocks one's sense of justice when "the figure of Justice totters on her pedestal," or when "the jury's verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience."

Furthermore,

> where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Foley, 38 A.3d 882, 891 (Pa. Super. 2012) (citation omitted), *appeal denied*, 60 A.3d 535 (Pa. 2013).

Instantly, the trial court opined, "Trooper Kingsley's identification of [Appellant] as the operator of the vehicle, coupled with the statement of [Appellant at the time of the stop] that [he] was the driver of the vehicle, [was] sufficient . . . ." Trial Court Op., 9/16/13, at 8. We detect no abuse of discretion in this reasoning. Specifically, our review reveals the trooper: (1) unequivocally identified Appellant in court,[6] (2) had ample opportunity to identify Appellant when issuing the initial citation,[7] (3) explained that a computer error in the TRACS system caused the initial citation to name

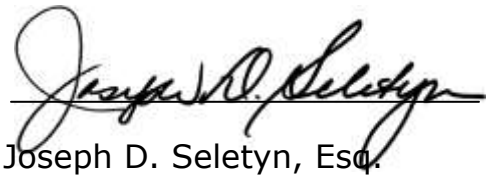
[6] ***See*** N.T. at 13.

[7] ***See id.*** at 11-12.

Appellant's son as the driver,[8] (4) subsequently confirmed Appellant's identity by photograph after he searched JNET, and (5) issued a corrected citation based on his identification of Appellant.[9] Accordingly, we find no basis to disturb the trial court's conclusion that Appellant's challenge to the weight of the evidence was meritless.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/25/2014

[8] ***See id.*** at 14. Specifically, the trooper testified that when preparing the initial citation, the TRACS system automatically entered the name of the owner of the vehicle, *i.e.*, Appellant's son Gregory, as the driver of the vehicle. ***Id.***

[9] ***See id.*** at 15.