IN THE COURT OF COMMON PLEAS FOR
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH	:	
v.	:	**No.: 04-10,867**
ADEN J. MOYER, **Defendant**	:	

OPINION AND ORDER

Before the Court is Defendant's Motion to Withdraw Plea of Guilty. Defendant was charged with two counts of Driving Under the Influence of Alcohol (DUI) and related summary offenses. Defendant entered a plea of guilty to two counts of the Information, including a violation of 75 Pa.C.S.A. § 3802(b), DUI, High Rate of Alcohol. Defendant's current Motion requests permission to withdraw the plea of guilty on the basis that § 3802(b) is unconstitutional.

The relevant facts are that on March 15, 2004, police stopped Defendant at approximately 3:19 a.m in Duboistown. Pursuant to the stop, police arrested Defendant and took him to Williamsport Hospital. A blood test was administered and the blood alcohol concentration (BAC) of Defendant was determined to be .13%. The provision at issue reads:

> 75 Pa.C.S.A. 3802 Driving under influence of alcohol or controlled substance
>
> (b) HIGH RATE OF ALCOHOL.-- An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

Defendant's first argument is that § 3802(b) allows for conviction when a defendant's BAC was not above the proscribed limit at the time of driving, but rose above the limit within two hours of driving. Defendant asserts that this violates due process, specifically that the statute is void for vagueness and overbroad.

When analyzing the constitutionality of a legislative enactment, it is well settled that,

> There is a strong presumption in the law that legislative enactments do not violate the constitution. [citations omitted]. Moreover, there is a heavy burden of persuasion upon one who challenges the constitutionality of a statute. [citation omitted]. While penal statutes are to be strictly construed, the courts are not required to give the words of a criminal statute their narrowest meaning or disregard the evident legislative intent of the statute. [citation omitted]. A statute, therefore, will only be found unconstitutional if it "clearly, palpably and plainly" violates the constitution.

Commonwealth v. Barud, 545 Pa. 297, 304, 681 A.2d 162 (1996).

"The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Due Process requirements are satisfied if the statute provides reasonable

standards by which a person may gauge their future conduct." *Commonwealth v. Mikulan*, 504 Pa. 244, 251, 470 A.2d 1339, 1342 (1983). "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972); *Barud*, 545 Pa. at 305.

Defendant relies primarily on *Barud*, in which the Court struck down an amendment that prohibited operation of a motor vehicle by a person over the legal BAC within three hours of driving. The *Barud* Court found the amendment unconstitutional because the underlying DUI statute required for conviction a BAC of .10% *at the time of driving.* Because *at the time of driving* was a necessary element of the offense, conviction under the statute of a driver with a BAC that rose above the legal limit only *after* driving was overbroad. The Court also deemed the provision void for vagueness because it created "significant confusion as to exactly what level of alcohol in the blood is prohibited." 545 Pa. at 306.

In contrast to the provision in *Barud*, § 3802(b) does not mandate that the requisite BAC be reached at the "time of driving" as an essential element of the offense. It is a prohibition on driving after imbibing, when the amount imbibed results in a BAC of .10% or higher within two hours of driving. It is true that a defendant may have a BAC below .10% while driving and be convicted under § 3802(b) if it rises above .10% within two hours after driving. However, this is not an ambiguity in the statute nor is it overbroad, it is simply included in the prohibited conduct. The legislature is well within their powers to create this framework; there is no fundamental right to drive after imbibing any amount of alcohol. "There is no constitutional, statutory or common law

right to the consumption of any quantity of alcohol before driving and there is little doubt that the legislature could, if it so chooses, prohibit driving within a certain reasonable time after any amount of alcohol (so long as the prohibition was rationally related to the legitimate legislative purpose)." *Mikulan*, 504 Pa. at 254.

The Court finds that § 3802(b) defines the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. The statute sets a BAC that cannot be exceeded within two hours of operating a motor vehicle. The requisite BAC is a clear standard. Defining DUI violations by BAC is widely used across the United States and is commonly recognized and understandable. The two-hour window within which the BAC may not be exceeded is also clear and easily comprehensible. When an individual chooses to operate a motor vehicle, he is aware that his BAC may not exceed .10% within two hours of said operation. The statute sets a reasonable standard by which a person may gauge their future conduct and is not void for vagueness. Neither is it overbroad. The amendment in *Barud* criminalized conduct expressly permissible in another provision. The current statute has eliminated this overbreadth.

Defendant also asserts that there is no defense to a charge under § 3802(b) in a situation where an individual consumed alcohol after driving which, when combined with alcohol consumed before driving raises his BAC above .10%. However, the Court finds that a distinct defense is not necessary since Defendant's hypothetical would not be a violation under a plain reading of the statute. The provision prohibits driving, operating or being in actual physical control of the movement of a vehicle "*after imbibing a*

sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% . . ." The prohibited conduct is driving after a sufficient amount of alcohol is consumed such that a .10% BAC will be reached. If the requisite BAC would not have been reached but for additional alcohol consumed after vehicle operation, 3802(b) will not apply.

Defendant argues that 75 Pa.C.S.A. § 3802(g) also violates Due Process. § 3802(g) states:

> EXCEPTION TO TWO-HOUR RULE.-- Notwithstanding the provisions of subsection (a), (b), (c), (e) or (f), where alcohol or controlled substance concentration in an individual's blood or breath is an element of the offense, evidence of such alcohol or controlled substance concentration more than two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle is sufficient to establish that element of the offense under the following circumstances:
>
> (1) where the Commonwealth shows good cause explaining why the chemical test could not be performed within two hours; and
>
> (2) where the Commonwealth establishes that the individual did not imbibe any alcohol or utilize a controlled substance between the time the individual was arrested and the time the sample was obtained.

The Court finds §3802(g) constitutional. "Good cause" is a familiar concept in a wide range of criminal laws and a reasonable person is well capable of understanding the concept. Subsection (2) does not set a limit as to the length of time beyond two hours that a test may be administered and remain admissible. However, it is well settled that alcohol absorbs fully between 30 and 90 minutes after imbibing, and the statute mandates that the Commonwealth establish that the defendant did not consume

alcohol between the time of driving and testing. Therefore, any driver tested beyond the two-hour limit would have had a higher BAC if tested within two hours of driving. § 3802(g) is not overbroad or vague.

Defendant's next argument is that the penalty provisions found in §§ 3803-3804 are unconstitutional because they deny substantive due process and equal protection of the law. Defendant asserts that the disparate treatment of individuals with varying BAC and/or individuals who refuse to submit to a test violates equal protection. He argues that there is no compelling state interest to support treating an individual with a .10% BAC disparately from an individual with a .099% or from a person refusing to submit to a test.

"In performing an equal protection analysis we must decide which of three levels of scrutiny to apply to the challenged statute: strict, intermediate or rational basis scrutiny. The level of scrutiny which a court applies depends upon the nature of the classification in the statute and the nature of the interest which the classification implicates." *Griffin v. SEPTA*, 757 A.2d 448, 451 (Pa.Commw. 2000). "[T]he types of classifications are: (1) classifications which implicate a "suspect" class or fundamental right**;** (2) classifications implicating an "important" though not fundamental right of a "sensitive" classification; and (3) classifications which involve none of these." Id., citing, *James v. Southeastern Pennsylvania Transportation Authority*, 505 Pa. 137, 145, 477 A.2d 1302, 1306 (1984). "Should the statutory classification in question fall into the first category, the statute is strictly construed in light of a "compelling" governmental purpose; if the classification falls into the second category, a heightened standard of scrutiny is applied to an "important" governmental purpose; and if the statutory scheme

falls into the third category, the statute is upheld if there is any rational basis for the classification." 757 A.2d at 451. The same levels of scrutiny apply to the due process analysis.

The present analysis requires determining the interest of the individual at stake and the importance of the governmental purpose the legislation serves. State limitations on citizens' rights to drive have not been subject to heightened scrutiny. *Commonwealth v. Zimmick*, 539 Pa 548, 559, 653 A.2d 1217, 1222 (1995), ("We must emphasize that driving is not a property right; rather it is a privilege). Further, legislation for the purpose of highway safety has received significant deference. "[P]robably the most important function of government is the exercise of the police power for the purpose of preserving the public health, safety and welfare, and it is true that, to accomplish that purpose, the legislature may limit the enjoyment of personal liberty and property." *Gambone v. Commonwealth*, 375 Pa. 547, 550-51, 101 A.2d 634, 636 (1954); See also, *Mackey v. Montryn,* 99 S.Ct. 2612 (1979); *Mikulan,* 504 Pa at 247 n. 6 (1983), ("paramount interest of the Commonwealth in preserving the safety of its public highways").

The first flaw in the Defendant's argument is that the Commonwealth must show a compelling state interest. The classifications within the penalty provisions do not interfere with a suspect class or fundamental right so are only subject to a rational basis analysis. The liberty interest the Defendant refers to in his due process claim is contemplated and protected at the adjudication stage. After conviction, the liberty interest of an individual is severely limited and in the present case will not support heightened scrutiny of the penalty provisions. It seems relatively clear that the

legislature, with the legitimate interest of highway safety in mind, may punish more harshly those drivers who are more highly intoxicated, and may establish categories of intoxication to do so. The legislature may also rationally conclude that in furtherance of compliance with the law, those who refuse to submit to testing are subject to a more severe penalty.

Defendant asserts that an absurd result occurs when comparing hypothetical offenders: a driver commits a first offense at .17% and receives ARD then commits a second offense at .09% and receives a 5-day mandatory. Contrast with a driver who commits offenses of .09% first and receives ARD, then .17% and receives 90 days. The Court disagrees that the result is absurd. The pertinent comparison is between two second-time offenders. Whatever the penalty for the first offense, both are on notice that they will receive harsher penalties for a second offense and that it will vary depending on their level of intoxication. When comparing the two drivers, the important factor is not what level of alcohol brought on their first offense, but rather at what level of alcohol were they convicted for their second offense. The ascending sentences for second-time offenders dependent on BAC is rationally related to deterring and punishing driving after imbibing.

ORDER

AND NOW, this ____ day of March, 2005, based on the foregoing Opinion, Defendant's Motion to Withdraw Plea of Guilty is hereby DENIED. Defendant's sentencing shall proceed on May 3, 2005, at 10:00 a.m. in Courtroom # 4. No other formal notification will be given and Defense counsel is instructed to notify Defendant of

the date and time set for sentencing. In the event Defendant fails to appear a bench warrant will issue for his arrest.

By the Court,

_____
Kenneth D. Brown, Judge

cc:
P. Campana, Esq.
DA (KO)
Judges
Gary Weber, Esq.