

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:
	:
vs.	: NO. 04-11,239
	:
JASON MICHAEL PROCTOR,	:
	:
Defendant	: 1925(a) OPINION

Date: September 23, 2005

**OPINION IN SUPPORT OF THE ORDER OF JULY 15, 2005 IN COMPLIANCE
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

Defendant Jason Michael Proctor has appealed his convictions for violating provisions of the Motor Vehicle Code, 75 Pa.C.S.A. §101 et seq. For the reasons that follow, Defendant's appeal should be denied and his conviction and sentence affirmed.

I. BACKGROUND

A. Charges and Sentence

The Commonwealth had charged Defendant with four offenses. They were: Count 1, driving an unregistered vehicle (75 Pa.C.S.A. §1301(a)), Count 2, exceeding maximum speed limit (75 Pa.C.S.A. §3362(a)(2)), Count 3, driving after imbibing, high rate of alcohol (75 Pa.C.S.A. §3802(b)), and Count 4, driving after imbibing, incapable of safe driving (75 Pa.C.S.A. §3802(a)(1)). On June 13, 2005, this court held a non-jury trial regarding those charges. On June 21, 2005, the court found Defendant guilty on all counts. On July 15, 2005, the court sentenced Defendant as follows: under Count 1, to pay a \$75.00 fine; under Count 2, to pay a \$73.00 fine, under Count 3, forty-eight months of Intermediate Punishment under the supervision of the Adult Probation Office of Lycoming County; six months of which would be

restrictive intermediate punishment to be served at the Lycoming County prison and/or work release center beginning on the day of sentence. The court determined that Count 4 merged with Count 3 for purposes of sentencing.

On August 10, 2005, Defendant filed his notice of appeal. On August 11, 2005, this court entered an order pursuant to Pa.R.A.P. 1925(b) directing Defendant to file a concise statement of matters complained of on appeal within fourteen days of notice of the order. On August 24, 2005, Defendant filed his statement of matters.

B. Defendant's Issues on Appeal

Defendant raises two main issues in the statement of matters. First, he contends that it was error to deny his Motion to Suppress Evidence filed October 18, 2004. Second, he contends that it was error to deny his Motion to Dismiss Count 3 of the Information filed December 9, 2004.

In the motion to suppress, Defendant argued that all evidence seized from him after the Pennsylvania State Police stopped his vehicle must be suppressed because probable cause did not exist to stop his vehicle nor to arrest him for driving while under the influence of alcohol. On November 22, 2004, the Honorable Kenneth D. Brown, President Judge, held a suppression hearing. On December 1, 2004, Judge Brown entered an order denying the motion to suppress.

In the motion to dismiss, Defendant argued that §3802(b) of the Motor Vehicle Code was unconstitutionally vague and overbroad. Defendant also argued that the sentencing provisions of §§3803 and 3804 violated the Equal Protection and Due Process clauses of the federal and state constitutions. In an order entered on December 15, 2004, Judge Brown dismissed the motion to dismiss as untimely pursuant to Pa.R.Crim.P. 579. On December 17,

2004, Defendant filed a motion for reconsideration. Judge Brown granted reconsideration on January 24, 2005. On March 23, 2005, Judge Brown denied the motion to dismiss based upon his opinion in *Commonwealth v. Moyer*, No. 04-10,867 (Opinion 3/21/05). Judge Brown found that §§3802, 3803, and 3804 of the Motor Vehicle Code did not violate the Equal Protection and Due Process clauses of the federal and state constitutions.

This court will not address the issues raised in the statement of matters concerning the motion to suppress and the motion to dismiss. Those issues were never before the court and it made no determinations concerning them.¹ Accordingly, the court will only address issues that were before it.

The only constitutional issue concerning §3802 that was before this court concerned the appropriate grading of the §3802(b) and §3802(a)(1) violations. At the July 15, 2005 sentencing hearing, Defendant argued that both the §3802(b) and §3802(a)(1) violations must be graded as ungraded misdemeanors because the Commonwealth failed to plead and prove beyond a reasonable doubt his prior driving under the influence convictions. Notes of Testimony, 7 (7/15/05). Defendant argued that Pennsylvania law treated prior convictions as elements of the offense and required that they be proven beyond a reasonable doubt when the prior convictions increased the grade of the offense or the maximum penalty. N.T., 6-9.

This court held that Pennsylvania law did not require the Commonwealth to plead and prove beyond a reasonable doubt Defendant's prior driving under the influence convictions.

¹ Judge Brown will likely address those issues. On August 11, 2005, Judge Brown issued an order in compliance with Pa.R.A.P. 1925(b) directing Defendant to file a concise statement of matters complained of on appeal. The certificate of service attached to Defendant's statement of matters indicates that he served Judge Brown with a copy of the statement of matters via courthouse mailbox.

The Court stated its reasons on the record at the July 15, 2005 sentencing hearing. N.T., 13-14. This opinion will clarify and supplement those reasons.

II. ISSUE

Whether the Commonwealth was required to plead and prove beyond a reasonable doubt that Defendant had more than one prior conviction for driving under the influence in order to convict him of a Misdemeanor 1 grade violation of 75 Pa.C.S.A. §3802(b) and a Misdemeanor 2 grade violation of 75 Pa.C.S.A. §3802(a)(1).

III. DISCUSSION

Initially, this opinion will set forth the relevant statutory provisions. The opinion will then address two possible theories which could require the Commonwealth to plead and prove beyond a reasonable doubt that defendant had more than one prior conviction for driving under the influence (hereafter “DUI”) in order to convict him of a Misdemeanor 1 grade violation of §3802(b) and a Misdemeanor 2 grade violation of §3802(a)(1). First, the opinion will address whether a prior conviction for DUI is an element of the driving after imbibing offense. Second, the opinion will address whether the due process requirements of the Pennsylvania Constitution require the Commonwealth to plead and prove beyond a reasonable doubt more than one prior DUI in order to convict Defendant of a Misdemeanor 1 grade violation of §3802(b) and a Misdemeanor 2 grade violation of §3802(a)(1).

A. Statutory Provisions

The general Assembly has declared it unlawful to operate a vehicle on the trafficways of this Commonwealth while under the influence of alcohol or drugs. This offense is codified at 75 Pa.C.S.A. §3802. With respect to being under the influence of alcohol, it provides:

(a) **General impairment.** –

(1) 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 individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

(2) An individual may not drive, operate or be in 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 0.08% but less than 0.10% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

(b) **High rate of alcohol** – An individual may not drive, operate or be in 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.

(c) **Highest rate of alcohol** -- An individual may not drive, operate or be in 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 0.16% or higher within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

75 Pa.C.S.A. §3802(a)-(c).

The grading for violations of §3802 is set forth in §3803. It provides as follows:

(a) **Basic offenses.** – Notwithstanding the provisions of subsection (b):

(1) An individual who violates section 3802(a) (relating to driving under the influence of alcohol or controlled substance) and has no more than one prior offense commits a misdemeanor for which the individual may

be sentenced to a term of imprisonment of not more than six months and to pay a fine under section 3804 (relating to penalties).

- (2) An individual who violates section 3802(a) and has more than one prior offense commits a misdemeanor of the second degree.

(b) Other offenses. –

- (1) An individual who violates section 3802(a)(1) where there was an accident resulting in bodily injury, serious bodily injury or death of any person or in damage to a vehicle or other property, or who violates section 3802(b), (e) or (f) and who has no more than one prior offense commits a misdemeanor for which the individual may be sentenced to a term of imprisonment of not more than six months and to pay a fine under section 3804.
- (2) An individual who violates section 3802(a)(1) where the individual refused testing of blood or breath, or who violates section(c) or (d) and who has no prior offenses commits a misdemeanor for which the individual may be sentenced to a term of imprisonment of not more than six months and to pay a fine under section 3804.
- (3) An individual who violates section 3802(a)(1) where there was an accident resulting in bodily injury, serious bodily injury or death of any person or in damage to a vehicle or other property, or who violates section 3802(b), (e) or (f) and who has more than one prior offense commits a misdemeanor of the first degree.
- (4) An individual who violates section 3802(a)(1) where the individual refused testing of blood or breath, or who violates section 3802(c) or (d) and who has one or more prior offenses commits a misdemeanor of the first degree.

75 Pa.C.S.A. §3803(a), (b). Under §3803, the number of prior DUI convictions is a factor that determines the grading of the offense. Thus, the number of prior DUI convictions plays a key role in determining the maximum punishment a defendant will receive.

B. Prior DUI Convictions as an Element of the Offense

The Commonwealth was not required to plead and prove Defendant's prior DUI convictions as an element of the offense charged. A prior conviction for DUI is not an element of the driving after imbibing offense. The prosecution bears the burden of establishing the elements of the crime charged. *Commonwealth v. Reilly*, 549 A.2d 503, 510 (Pa. 1988). To meet this burden, due process requires that the Commonwealth prove every element of the crime charged beyond a reasonable doubt. *Patterson v. New York*, 432 U.S. 197, 210 (1972); *In re Winship*, 397 U.S. 358, 362 (1970); *Commonwealth v. Wright*, 494 A.2d 354, 358 (Pa. 1985); *Commonwealth v. Bailey*, 292 A.2d 345, 346 (Pa. 1972).

Determining what fact constitutes an element of an offense is a matter of statutory construction. *Commonwealth v. McFarland*, 382 A.2d 465, 470 (Pa. Super. 1977). The resolution of what constitutes an element of an offense depends upon what the legislature intended to prohibit. *Ibid.* The Pennsylvania Crimes Code defines "element of an offense" as:

Such conduct or such attendant circumstances or such a result of conduct as:

- (1) is included in the description of the forbidden conduct in the definition of the offense;
- (2) establishes the required kind of culpability;
- (3) negatives an excuse or justification for such conduct;
- (4) negatives a defense under the statute of limitation; or

(5) establishes jurisdiction or venue.

18 Pa.C.S.A. §103.

A prior conviction for DUI does not fall within the enumerated criteria of §103. Section 3802 defines the offense of driving after imbibing. Section 3802 does not include a prior conviction for DUI within the definition of the prohibited conduct. The prior DUI conviction language appears in §§ 3803 and 3804. Section 3803 determines the grading for a violation of §3802. Section 3804 sets forth the penalties for a violation of §3802. The prior conduct language is part of the sections that determine how severe the prohibited conduct will be treated, but it does not define the prohibited conduct.

Further, the prior conviction for DUI does not establish the kind of culpability required to commit the offense. A prior DUI conviction does not excuse or justify driving under the influence of alcohol. It does not negate a defense under the statute of limitations. A prior conviction for DUI would not establish jurisdiction or venue for the present DUI offense charged.

Accordingly, due process did not require the Commonwealth to plead and prove beyond a reasonable doubt a prior conviction for DUI in order to convict Defendant of a Misdemeanor 1 violation of §3802(b) and a Misdemeanor 2 grade violation of §3802(a)(1) because a prior DUI conviction is not an element of the driving after imbibing offense.

C. Due Process Requirements of the Pennsylvania Constitution

The due process requirements of the Pennsylvania Constitution did not require the Commonwealth to plead and prove beyond a reasonable doubt that Defendant had more than one prior DUI conviction in order to convict him of a Misdemeanor 1 grade violation of

§3802(b) and a Misdemeanor 2 grade violation of §3802(a)(1). Traditionally, Pennsylvania courts have treated prior convictions as elements of the offense when the prior conviction would increase the maximum sentence or change the grade of the offense. *Commonwealth v. Reagan*, 502 A.2d 702, 705 (Pa. Super. 1985). However, Pennsylvania has abandoned this approach.

In *Commonwealth v. Aponte*, the defendant asserted that 35 P.S. §780-115(a), which doubles the statutory maximum penalty upon proof of a prior conviction for a similar offense (drug related) without requiring proof beyond a reasonable doubt before a jury, violated his due process rights under the Pennsylvania Constitution. 855 A.2d 800, 802 (Pa. 2004). The Pennsylvania Supreme Court held that it did not. Mirroring the rule laid down in *Apprendi v. New Jersey*, 530 U.S. 481 (2000),² the Supreme Court said, “Thus, in cases where the fact which increases the maximum penalty is not a prior conviction and requires a subjective assessment, anything less than proof beyond a reasonable doubt before a jury violates due process. Additionally, any judicial finding which results in punishment beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.” *Id.* at 811. With regard to prior convictions, it explicitly stated, “Where, however, the judicial finding is the fact of a prior conviction, submission to a jury is unnecessary, since the prior conviction is an objective fact that initially was cloaked in all the constitutional safeguards, and is now a matter of public record.” *Ibid.*

² The *Apprendi* rule states that any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490.

Accordingly, the due process requirements of the Pennsylvania Constitution did not require the Commonwealth to plead and prove beyond a reasonable doubt that Defendant had more than one prior DUI conviction in order to convict him of a Misdemeanor 1 grade violation of §3802(b) and a Misdemeanor 2 grade violation of §3802(a)(1).

IV. CONCLUSION

Defendant's appeal should be dismissed and his conviction and sentence affirmed.

BY THE COURT,

Date: September 23, 2005

William S. Kieser, Judge

cc: District Attorney's Office
Peter T. Campana, Esquire
Judge Brown
Judges
Christian Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)