IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1239-2004**
	:	**(04-11,239)**
vs.	**:**	
	:	
	:	
JASON PROCTOR,	**:**	
Appellant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's orders denying Appellant's motion to suppress and his motion to dismiss.

On April 25, 2004 at approximately 9 p.m., Trooper Richard Holtz was operating radar on State Route 220 in Woodward Township, Lycoming County. The radar unit he was using was GHS 2781, a handheld radar unit manufactured by Decatur Electronics. Trooper Holtz observed a red Nissan Frontier traveling southbound at a high rate of speed. He activated the radar unit through an open window of his vehicle. The Nissan Frontier was traveling at a speed of 74 mph in an area where the posted speed limit was 55 mph. Trooper Holtz stopped the vehicle. Appellant, Jason Proctor, was the driver of the vehicle. Trooper Holtz detected a strong odor of alcohol emanating from Appellant. Trooper Holtz also noticed that Appellant's eyes were somewhat bloodshot and Appellant's speech was slightly slurred. Trooper Holtz asked Appellant to perform field sobriety tests. Trooper Holtz administered the walk-and-turn and the one leg stand. Appellant failed both tests. Trooper Holtz arrested Appellant for driving under the influence of alcohol. Trooper Holtz transported Appellant to the Williamsport Hospital for a chemical test of his blood.

The blood draw occurred approximately 50 minutes after Trooper Holtz stopped Appellant's vehicle. Appellant's blood alcohol content was .14%.

Appellant's counsel filed a Motion to Suppress, in which he alleged the police lacked probable cause to stop Appellant's vehicle or to arrest him. At the hearing on the motion, Trooper Holtz testified to the facts set forth above. Trooper Holtz also testified that Guth Laboratories tested the radar unit on April 22, 2004 and Trooper Holtz tested the unit internally and externally prior to running the radar unit and at the end of his shift on April 25, 2004, the date of this incident. The Commonwealth admitted the certificate of accuracy for the radar unit as Commonwealth's Exhibit 1 and asked the court to take judicial notice of Pennsylvania Bulletin, Volume 33, No. 52, (specifically pages 6469 and 6470), which indicated the GHS radar unit was an approved electronic speed-timing device when used in the stationary mode and Guth Laboratories was an approved testing station.

At the close of the hearing, Appellant's counsel conceded there was probable cause to stop the vehicle and arrest Appellant if the radar unit was used in the stationary mode. Despite Trooper Holtz' testimony that his vehicle was stationary when he used the radar unit to time the speed of Appellant's vehicle, Appellant's counsel contended the unit had to be affixed to the trooper's vehicle to be considered stationary. The court gave defense counsel time to submit any case law he could find on this issue, but he found none. The court found that the term "stationary" meant the trooper's vehicle could not be moving, and it denied the motion to suppress.

On December 9, 2004, Appellant's counsel filed a motion to dismiss count 3 of the information because he believed §3802(b) of the Vehicle Code, 75 Pa.C.S. §3802(b), was unconstitutional in the following respects: (1) it permits the Commonwealth to obtain a

conviction where a defendant's blood alcohol content (BAC) was not above the legal limit at the time of driving but rose above the limit within two hours after he had driven; (2) the Vehicle Code does not provide a defense in a situation where the defendant consumed alcohol after driving which, combined with alcohol consumed prior to driving, cause the defendant's blood alcohol level to rise above the legal limit within two hours after driving; and (3) the gradation of punishment based upon blood alcohol content is a denial of equal protection and substantive due process.

Appellant's first argument was 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. Appellant asserted this violated due process, specifically that the statute was 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. Moreover, there is a heavy burden of persuasion upon one who challenges the constitutionality of a statute. While penal statutes are to be strictly construed, the court are not required to give the words of a criminal statute their narrowest meaning or disregard the evident legislative intent of the statute. 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.

Appellant relied primarily on Barud, in which the Court struck down an amendment that prohibited the 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 of 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 his BAC 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 its 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 found §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.

Appellant also asserted 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%. The court found a distinct defense was not necessary since Appellant'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 consumer after vehicle operation, 3802(b) will not apply.

Appellant's next argument was that the penalty provisions found in §§3803-3804 are unconstitutional because they deny substantive due process and equal protection of the law. Appellant asserted that the disparate treatment of individuals with varying BAC and/or individuals who refuse to submit to a test violates equal protection. He also argued 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 SEPTA, 505 Pa. 137, 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, 374 Pa. 547, 550-51, 101 A.2d 634, 636 (1956); 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 Appellant'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 Appellant 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.

Appellant asserted that an absurd result occurs when comparing hypothetical offenders: a driver commits a first offense at .175 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 disagreed that the result was 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 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.

DATE: _____ By The Court,

_____
Kenneth D. Brown, P. J.

cc: Kenneth Osokow, Esquire (ADA)
Peter Campana, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)