IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
vs.	**:**	**No. CR-1943-2016**
	:	
MICHAEL DeSCISCIO,	**:**	**Motion to Establish Number of**
Defendant	**:**	**Prior Offenses**

OPINION AND ORDER

By Information filed on November 18, 2016, Defendant is charged with Driving Under the Influence (DUI) of a controlled substance and related summary offenses. The Commonwealth alleges that on August 5, 2016, Defendant was operating a green Ford F-250 pickup truck in the area of the 1900 block of East Third Street in Loyalsock Township, Lycoming County. The Commonwealth alleges that Defendant was operating the truck while under the influence of a combination of drugs to a degree which impaired his ability to safely drive. The Commonwealth further alleges that at the time he operated the truck, there were three controlled substances in Defendant's blood including: Clonazepam, Carisoprodol and Meprobamate.

Defendant initially waived his preliminary hearing. Subsequently, Defendant waived his arraignment and scheduled a guilty plea. The guilty plea hearing initially scheduled for January 20, 2017, was continued to April 28, 2017, because the parties were "still negotiating." On April 28, 2017, however, Defendant indicated that he was not willing to plead guilty. Defendant had previously filed a suppression motion which was scheduled to be heard on June 12, 2017. Curiously, Defendant continued his scheduled pretrial because "there are ongoing plea negotiations."

On August 28, 2017, Defendant filed a "motion to establish number of prior offenses." Defendant seeks a decision by the court that the current offense is a second offense graded as a misdemeanor of the first degree and not a fourth offense.

Argument on Defendant's motion was held on September 27, 2017. While the court was expecting and in fact indicated that it would render a decision "relatively quickly", the court was not provided with Defendant's "prior records" until October 23, 2017.

At the hearing, held on September 27, 2017, the court upon stipulation of the parties agreed to allow the record to remain open in order for the records of Defendant's prior convictions to be made part of the record and considered by the court.

The definition of a prior offense is contained in 75 Pa. C.S.A. § 3806. The term means a conviction, adjudication of delinquency, juvenile consent decree, acceptance of accelerated rehabilitative disposition or other form of preliminary disposition before the sentencing on the present violation for any of the following:

> (1) An offense under § 3802;
> (2) An offense under former § 3731;
> (3) An offense substantially similar to an offense under paragraph (1) or (2) in another jurisdiction; or
> (4) Any combination of the offenses set forth in paragraphs (1) (2) or (3).

For purposes of grading and penalties, the prior offense must have occurred within ten years prior to the date of the offense for which the defendant is being sentenced. 75 Pa. C.S.A. § 3806 (b) (1) (i).

Defendant concedes that he has a prior DUI conviction in 2016 from Centre County, Pennsylvania. Defendant disputes, however, that his convictions in 2010 and 2014 in

Florida should count as prior offenses. Although, they are within ten years of the date of the offense for which Defendant may be sentenced, Defendant argues that they are not "equivalent offenses." (Motion to Establish Number of Prior Offenses, paragraph 4).

Initially, and as conceded by Defendant at the argument in this matter, the term "equivalent offenses" is no longer applicable. The determinative term is "substantially similar." 75 Pa. C.S.A. § 3806 (a) (3).

As the Pennsylvania Superior Court noted in ***Commonwealth v. Pombo***, 26 A.3d 1155 (2011): "In revising the DUI laws, the Legislature did away with the term 'equivalent offenses.' The statute now provides for enhanced sentences following convictions for offenses 'substantially similar' to Pennsylvania's previous and current DUI statutes." ***Id.*** at 1158 (citing ***Commonwealth v. Northrip***, 603 Pa. 544, 985 A.2d 734, 738 n.5 (2009)).

The Legislature also utilized the term "substantially similar" in the Driver's License Compact, specifically 75 PA. CONS. STAT. § 1586. With respect to the Compact, the Pennsylvania Supreme Court found that section 1586 clearly broadened the scope of offenses that Pennsylvania could consider to be substantially similar. ***Commonwealth v. Wroblewski***, 570 Pa. 249, 809 A.2d 247 (2001). While not specifically defining the phrase "substantially similar," the court held that a New York conviction was substantially similar to a Pennsylvania DUI conviction, even though the New York statute permitted a conviction for a lower level of impairment than the Pennsylvania DUI statute. ***Id.*** at 251. The court noted that the legislature sought to promote a policy of compliance with the laws relating to

the operation of motor vehicles in separate jurisdictions and that by enacting section 1586, the Legislature sought to promote said policy by sanctioning those Pennsylvania licensed drivers who violated the impairment laws of other party states, even if those other states' offenses had lower thresholds of impairment than under Pennsylvania law. ***Id***.; see also 75 PA. CONS. STAT. §1586 ("The fact that the offense reported to the department by a party state may require a different degree of impairment of a person's ability to operate, drive or control a vehicle than that required to support a conviction for violation of section 3802 shall not be a basis for determining that the party state's offense is not substantially similar to section 3802 for purposes of Article IV of the compact.").

The Pennsylvania Supreme Court also examined the meaning of the term "substantially similar" as used in the Controlled Substance Act. 35 P.S. § 780-113 (a) (36). ***Commonwealth v. Herman***, 161 A.3d 194 (Pa. 2017). Among other conclusions, the court noted that the concept of similarity is well known to persons of ordinary intelligence. The "substantial" qualifier speaks to the degree of similarity needed to bring a substance within the designer drug prohibition. Quoting ***Nash v. United States***, 229 U.S. 373, 377, 33 S. Ct. 780, 781 (1913), the court noted that "the law is full of instances where a man's fate depends on his estimating rightly … some matter of degree." ***Herman***, 161 A.3d at 211.

In ***Northrip***, supra., utilizing the prior "equivalency" language, the court instructed the lower courts to look at the elements of the foreign offense in terms of classification of conduct proscribed, its definition of the offense, and the requirements for culpability. As well, it is necessary to examine the definition of the conduct or activity

proscribed. The court should identify the elements of the crime, the actus reus and the mens rea, which all form the basis of liability. An equivalent offense was determined to be an offense which is substantially identical in nature and definition. Obviously, a substantially similar offense is more liberal in interpretation and broader in scope.

On October 11, 2010, defendant was "adjudged guilty" of DUI in the state of Florida, see FLA. STAT. §316.193(1)(a). On July 1, 2014, the defendant was again "adjudged guilty" of the same offense as a second conviction. This conviction occurred in Hillsborough County in the state of Florida while the 2010 conviction occurred in Orange County, in the state of Florida.

Under subsection (1)(a) of the Florida DUI statute, a person is guilty of the offense of DUI if the person is driving or is in actual physical control of a vehicle and the person is under the influence of alcoholic beverages, any chemical substance set forth in § 877.111, or any controlled substance under a chapter 893, when affected to the extent that the person's normal faculties are impaired.

Defendant argues that the statutes are not substantially similar because the degree of impairment is lesser under the Florida statute than it is under the Pennsylvania statute. Specifically, Defendant argues that in Florida the extent of impairment is when one is affected to the extent that the person's normal faculties are impaired. In comparison, in Pennsylvania the impairment must be such that the individual is under the influence to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of a vehicle. More precisely, Defendant argues that in Florida

impairment is established if a person's normal faculties are impaired, while in Pennsylvania impairment must impact the individual's ability to safely drive. Based on this difference, Defendant asserts that the Florida convictions are not substantially similar to a DUI offense under section 3802.

In support of his argument, Defendant provided to the court Florida statute §316.1934 which is entitled "Presumption of Impairment." Paragraph (1) of §316.1934 states:

> It is unlawful and punishable as provided in ... §316.193 for any person who is under the influence of alcoholic beverages or controlled substances, when affected to the extent that the person's normal faculties are impaired or to the extent that the person is deprived of full possession of normal faculties, to drive or be in actual physical control of any motor vehicle within this state. Such normal faculties include, but are not limited to, the ability to see, hear, walk, talk, judge distances, drive an automobile, make judgments, act in emergencies, and , in general, normally perform the many mental and physical acts of daily life.

FLA. STAT. §316.1934(1).

While the court agrees that the Florida statute is broader than the Pennsylvania statute and that a person in Florida could more easily be convicted of driving under the influence, the court also concludes that the statutes are substantially similar for DUI purposes. In fact, the court sees little difference between the facts of this case and ***Wroblewski***, supra. While the Florida statute permits a conviction for arguably a lower level of impairment than the Pennsylvania DUI statute, they are still substantially similar.

The proscribed conduct involves consuming alcohol or controlled substances and driving or operating a vehicle to the extent one becomes unsafe in connection with said

operation. The act of driving while impaired is proscribed. The mens rea attached to driving under the influence is also similar. In looking at the definition of each offense, they are clearly similar. Indeed, the Florida statute cited by the defendant also notes that a person's faculties are impaired to the extent that the person is deprived of full possession of normal faculties to drive or be in actual physical control of any motor vehicle. The substantial similarity between the two statutes is also borne out when the Florida presumption of impairment is compared to the meaning of the phrase "incapable of safe driving" under Pennsylvania law. The Pennsylvania Standard Suggested Jury Instructions define "incapable of safely driving" as follows:

> Under Pennsylvania law, the phrase "incapable of safe driving" has a precise legal meaning. The defendant need not have been drunk or severely intoxicated or driving wildly or erratically to commit this crime. It is enough if alcohol had substantially impaired the defendant's normal mental and physical faculties that were essential to safe operation of a vehicle. Thus, when deciding whether the Commonwealth has met its burden of proof, you might ask yourselves, "Were the defendant's thinking, judgment, physical skills, ability to perceive and react to changes in the situation, or other faculties impaired? If so, how badly, and was the impairment caused by [his] [her] use of alcohol?

Pa.SSJI §17.3802(a)(1). The "normal faculties" specifically listed in the Florida statute (i.e., to see, hear, judge distances, drive an automobile, make judgements and act in emergencies) are merely a more specific enumeration of the normal mental and physical faculties essential to the safe operation of a vehicle that Pennsylvania jurors ponder when determining if an individual was incapable of safely driving. The policy behind each statute is also similar if not exact.

Substantial similarity does not require exactitude or equivalency. In this

case, under all of the circumstances, the offenses are certainly close enough.

ORDER

AND NOW, this ___ day of November 2017, following a hearing and argument, the relief requested in Defendant's motion to establish number of prior offenses is **DENIED**. The court holds that if Defendant is convicted of this offense, it would constitute Defendant's fourth offense within ten years under Pennsylvania law.

By The Court,

_____
Marc F. Lovecchio, Judge

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