alone. The fact that she was mistaken in this belief cannot operate, we believe, to transform her actions into an offer to partition the real estate.

REIMBURSEMENT OF IRENE'S EXPENSES

At the argument, Irene's attorney asked the court to require Clarence to reimburse Irene for half of the property maintenance costs incurred since Clarence stopped contributing to such expenses. The issue was not brought before us except at the time of argument. No evidence was presented that would permit the court to calculate the sum to which Irene might be entitled. In addition, we do not know whether the money Irene spent was her own or funds which Clarence provided.

CONCLUSIONS OF LAW

1. The parties, Clarence H. Crow and Irene K. Crow, husband and wife, owned the real estate in question in these proceedings as Tenants by the Entireties prior to the time the wife using a general power of attorney conveyed the premises placing the record title in her name alone.

2. The conveyance was made pursuant to authority given to the wife by the husband.

3. It was the intent of the parties at the time of the conveyance that the conveyance would serve to prevent a lien from being placed on the property as a result of the husband's being delinquent on a North Carolina Support Order.

4. At the time of the conveyance, the husband did not intend to surrender his beneficial interest in the property.

5. Whether the property had been conveyed to the wife or not, it was immune from the lien sought to be avoided.

6. To allow the wife to retain full ownership of the property would result in her unjust enrichment.

7. The wife holds the property subject to a constructive trust for the benefit of the husband's interest in the property.

8. The husband is not barred from the relief of a constructive trust by his improper motive since he worked no actual fraud on any party.

9. The wife will be required to reconvey the property to the husband and wife as tenants by the entireties.

10. The wife's actions in refusing to reconvey the property prior to the institution of this suit did not constitute an offer to partition the real estate.

11. The husband is not liable for half of the maintenance expenses incurred by the wife during the time the wife alone paid such expenses.

ORDER OF COURT

NOW, July 24, 1978, IT IS ORDERED that Irene K. Crow, also known as Irmgard K. Crow, holds the property described in paragraphs 6 and 7 of the complaint in these proceedings in a constructive trust for her husband, Clarence H. Crow and herself as tenants by the entireties, and

IT IS THEREFORE FURTHER ORDERED that she reconvey the property to her husband and herself as tenants by the entireties.

Clarence H. Crow's prayer, that Irene's refusal to reconvey to property amounts to an offer to partition, is denied.

The parties shall each pay their own costs.

COMMONWEALTH v. GALLAGHER, C.P. Cr. D. Fulton County Branch, No. 101 of 1973

Criminal Law - Operating Motor Vehicle While Under Influence of Intoxicating Liquor - Post Trial Motions - Sufficiency of Evidence - Circumstantial Evidence - Relevancy of Ownership of Vehicle - Cautionary Instructions - Imposition of New Suspended Sentence When No Supersedeas Involved in Earlier Appeal

1. The Commonwealth's burden of proof in a criminal case may be met by circumstantial evidence alone.

2. Upon a post trial motion in arrest of judgment, the evidence must be considered in the light most favorable to the Commonwealth.

3. To warrant a conviction on circumstantial evidence the facts and circumstances established by such evidence must be of such a character as to produce a moral certainty beyond a reasonable doubt, but need not be absolutely incompatible with innocence.

4. In a case in which the defendant's vehicle was found in the early morning hours parked in an awkward and dangerous position in a

cross-over area on the Pennsylvania Turnpike, a limited access highway, so that it partially obstructed both inner lanes, and the defendant was found seated behind the steering wheel of the vehicle, slumped across the seat in an unconscious condition, with no one else either in or near the vehicle, and when he was then under the influence of intoxicating liquor, the evidence was sufficient to sustain conviction by the jury.

5. While the Pennsylvania Superior Court had previously held the warrantless arrest in this case was unlawful because the defendant was not operating the vehicle when the police arrived, this holding is distinguishable from the issue involved in determining whether or not the circumstantial evidence was sufficient to sustain a conviction of the crime, for here the question is, was there enough evidence for the jury to infer that the defendant had operated the vehicle to the place where it was found, and that he was under the influence while doing so.

6. The mere fact of ownership of a vehicle is not, in and of itself, evidence of the operation of a motor vehicle, but such evidence was not prejudicial in this case, especially in light of cautionary instructions given to the jury.

7. It is not error for the Court to impose a new suspended sentence of the same duration as that imposed following a conviction later reversed for a new trial, when despite the absence of a supersedeas pending appeal of the earlier conviction, the defendant was not actually subjected to probation before the new suspended sentence was imposed.

Gary D. Wilt, District Attorney, Attorney for the Commonwealth

Kenneth E. Hankins, Jr., Esq., and *Blake E. Martin, Esq.*, Attorneys for Defendant

OPINION

Keller, J., September 1, 1977:

This opinion is written in support of our dismissal of the defendant's post-trial motions.

Judge Van der Voort of the Superior Court of Pennsylvania, in his opinion filed September 27, 1976, reversing and remanding this action for new trial, concisely summarized the facts from which the action arises as follows:

During the early morning hours of May 23, 1973, Pennsylvania State Policemen Charles W. Conley and Robert J. Kovel were on turnpike patrol when they came upon an Oldsmobile station wagon illegallyparked in a turnpike cross-over area. The automobile was parked so as to partially

obstruct both inner or "fast" lanes of the turnpike. The vehicle's engine and lights were turned off, and Elwood Gallagher, appellant in the case, was sound asleep on the front seat. The police officers aroused appellant, observing a strong odor of alcohol on his breath, and helped him across the highway to a place of safety. Concluding that appellant had been driving while under the influence of liquor, the officers advised him of his Miranda rights, and transported him in their patrol car to a State Police barracks.

Pursuant to the order of the Superior Court, the new trial was held on February 14, 1977, a continuance having been granted to that date on pre-trial application of the defendant, joined in by the District Attorney. The jury returned a verdict of guilty and post-trial motions were timely filed on February 18, 1977. Such motions were dismissed and the defendant appeared for sentencing on July 5, 1977. The sentence then imposed was identical to that imposed following the first jury trial on this matter; that is, a suspended sentence and probation for a period of six (6) months, and a fine of $300.00, plus costs of prosecution. On July 13, 1977, we ordered a stay of execution of this sentence and granted a supersedeas, restoring the motor vehicle operating privileges to the defendant, pending the outcome of the appeal of this matter presently before the Superior Court. By order of July 13, 1977, made pursuant to Pa. R.A.P. 1925(b), the defendant was directed to furnish us with a concise statement of the matters complained of on this appeal. He presents three arguments which we will deal with seriatim.

WAS THE EVIDENCE PRESENTED AT TRIAL INSUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION, AND DID THIS COURT THEN ERR IN DISMISSING THE DEFENDANT'S MOTION IN ARREST OF JUDGMENT?

In his brief sur post-trial motions the defendant cites cases from Illinois, Iowa, Maryland and Missouri to support his contention that the evidence presented was insufficient to sustain conviction. Little is added to the defendant's argument by the inclusion of these citations, as they obviously are not controlling and, in any event, are distinguishable factually from the instant case. The defendant-drivers in three of those cases were outside of their vehicles when the arresting officers arrived, and, in the fourth case, the defendant's vehicle was properly parked on the shoulder of the road when the police arrived.

That the defendant has ranged so far afield in attempting to support his argument suggests the weakness of the argument. This is further illustrated by the fact that the defendant cites *Commonwealth v. Wilson*, 225 Pa. Super. 513, 312 A. 2d 430 (1973) as being "of particular significance on point" and "about the same as the instant case." *Wilson* is clearly distinguishable for in that case a witness supported the defendant's testimony that he, and not the defendant, had been driving the car at the time in question. Despite the defendant's assertion that the Court in *Wilson* had discounted that testimony, specifically noting that it was uncontradicted and given not voluntarily but under subpoena, in reversing the conviction. *Commonwealth v. Wilson*, supra, at p. 518.

Commonwealth v. Kriner, 234 Pa. Super. 230, 338 A. 2d 683 (1975), and the instant case on previous appeal, both of which are cited by the defendant, are likewise inapplicable here. Both cases dealt with the admissibility of evidence obtained pursuant to an unlawful arrest. In the case at bar, no evidence obtained after the defendant was placed under arrest was introduced. Judge Van der Voort, in his opinion on the previous appeal, expressly stated that the defendant was not arrested until he was placed in the patrol car for transportation to the police barracks. Nothing occurring after the arrest was presented as evidence in the second jury trial.

It is settled law that the Commonwealth's burden of proof in convicting a person of a crime can be met by circumstantial evidence alone. See *Commonwealth v. Simmons*, 233 Pa. Super. 547, 336 A. 2d 624 (1975), and cases cited therein. The Pennsylvania Supreme Court has also stated that "while it is true that the Commonwealth must prove every element of the crime charged beyond a reasonable doubt, *Commonwealth v. Johnston*, 438 Pa. 435, 263 A. 2d 376 (1970); *Commonwealth v. Yeager*, 329 Pa. 81, 196 A. 827 (1938), this does not mean that it must prove every 'item of evidence' beyond a reasonable doubt." *Commonwealth v. Jones*, 452 Pa. 569, 583, 308 A. 2d 598, (1973).

The jury was free to reject any or all of the Commonwealth's evidence, and there is no reason to second-guess them now. Given the guilty verdict, the evidence must be considered in the light most favorable to the Commonwealth. *Commonwealth v. Williams*, Pa. , 362 A. 2d 244, 248 (1976). In addition, "The law is well established that in considering the appeal of a defendant after a verdict or plea of guilty, the test of the sufficiency of the evidence is whether, accepting as true all the evidence upon which, if believed, the jury could have properly based its

verdict, such evidence is sufficient in law to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. . . ." *Commonwealth v. Gockley*, 411 Pa. 437, 440-441, 192 A. 2d 693, 695 (1963). (Citations omitted.)

The Commonwealth had the burden of proving that the defendant did operate a motor vehicle and that at the time of operation he was under the influence of intoxicating liquor. The rule is that "to warrant a conviction on circumstantial evidence the facts and circumstances established by such evidence must be of such a character as to produce a moral certainty beyond a reasonable doubt, but need not be absolutely incompatible with innocence." *Commonwealth v. Feinberg*, 211 Pa. Super. 100, 113, 234 A. 2d 913, 919 (1967).

The Commonwealth fulfilled its burden by proving the following facts:

(1) The defendant's vehicle was found in the early morning hours parked in an awkward and dangerous position in a cross-over area on the Pennsylvania Turnpike, a limited access highway, so that it partially obstructed both inner lanes.

(2) The defendant was found seated behind the steering wheel of the vehicle, slumped across the seat in an unconscious condition, with no one else either in or near the vehicle.

(3) The defendant was under the influence of intoxicating liquor when the officers arrived at the scene.

The jury could reasonably find that the defendant's vehicle had been driven to that spot and parked in that position by someone. By the dangerous and awkward position in which the vehicle was parked, the jury could reasonably conclude that the operator had not been in complete control of his faculties at the time he drove it to that point. Since the defendant was found with his legs and lower body under the steering wheel in the driver's position, alone in the automobile and with no one else around, the jury could reasonably find that the defendant had driven the vehicle to that spot. And, since the defendant was under the influence of alcohol when the officers arrived on the scene, it was reasonable for the jury to conclude that he had been under the influence at the time the vehicle was driven there and parked.

IS EVIDENCE OF REGISTRATION AND OWNERSHIP OF THE VEHICLE PREJUDICIAL, WHEN THE COURT SPECIFICALLY INSTRUCTS THE JURY THAT OWNERSHIP ALONE IS NOT EVIDENCE OF OPERATION OF SAID VEHICLE; AND DID THIS COURT ERR BY ADMITTING SUCH EVIDENCE?

The defendant cites *Commonwealth v. Slaybaugh*, Pa. , 364 A. 2d 691 (1976), to support his assertion that the testimony of the officers as to the defendant's registration card and its indication that he was the owner of the vehicle parked in the medial strip was, in itself, prejudicial.

In *Slaybaugh*, the Court held Sect. 1212 of the Vehicle Code to be unconstitutional because it shifted the burden of proof to the defendant, after it is shown that he owned the vehicle in question, to testify that he had not been driving it at the time in question.

Slaybaugh clearly is inapplicable to this issue in the instant case, and it does not support the defendant's argument. We specifically and expressly instructed the jury in our charge (N.T. 42-43) that "The mere fact of ownership of a vehicle is not, in and of itself, evidence of the operation of a motor vehicle. More than that is required."

Our charge clearly is in accordance with the *Slaybaugh* holding that "the inferred fact of operation of a motor vehicle at a specific time does not flow logically beyond a reasonable doubt from the mere established fact of ownership." *Commonwealth v. Slaybaugh*, supra, at p. 690.

DID THIS COURT ERR IN IMPOSING A NEW SUSPENDED SENTENCE WHEN NO SUPERSEDEAS HAD BEEN ENTERED DURING THE EARLIER APPEAL, AND WHEN THE TIME OF SUSPENSION OF SENTENCE PREVIOUSLY IMPOSED HAD EXPIRED?

It is not disputed that the defendant was never subjected to probation and did not pay any fine or costs under the previous sentence. In addition, the defendant will be given credit on the suspension now imposed for the time that his privileges were suspended following the first trial on this matter and prior to reinstatement pending appeal.

The defendant's argument on this point is unclear but seems to be based upon the Constitutional protections against double jeopardy. He cites no authority to support his position.

We believe that it is readily apparent that the defendant's contention on this point is illogical and contrary to common sense. The defendant did not serve the previous suspended sentence and did not pay the costs or fines then imposed. It is then neither unlawful, unfair, nor unconstitutional for us to now impose a second suspended sentence and fine, following a second jury trial and verdict.

For the above stated reasons, we are of the opinion that the defendant's contentions are without merit and that his post-trial motions were properly dismissed.

Editor's Note: This conviction was sustained by the Pennsylvania Superior Court, per curiam, with dissents by Jacobs, P. J., and Hoffman, J., on June 7, 1978. See No. 404 March Term, 1977. Allocatur was denied by the Pennsylvania Supreme Court, per curiam, on August 9, 1978. See No. 370 Allocatur Docket.

IN RE: ESTATE OF DICKEN, C.P. O.D. Franklin County Branch, Est. No. 75-082

Orphan's Court - Exceptions to Auditor's Report - Quantum meruit - Express contract for Services Rendered a Decedent - Costs.

1. Where an express contract has been asserted but not proven, the claimant may not then rest his claim upon the theory of quantum meruit even if a valid claim under that theory exists.

2. There is a presumption of full satisfaction where a person has received periodically a certain sum of money for services performed.

3. Where compensation has been given for services rendered a decedent, an action for additional compensation must be supported by proof of the existence of a special contract beyond the original agreement.

4. Proof that decedent inquired of third parties whether a specific sum of money would be adequate compensation for services performed constitutes sufficient evidence of a special contract for additional services rendered the decedent.

5. Allowance of costs in Orphan's Court is in the sound discretion of the court.

6. Where the subject matter in dispute was a mixed question of law and fact calling for the opinion and judgment of the court, and the contention before the auditor in a distribution case was filed in good faith with probable cause to object to the auditor's conclusion, the estate is to bear the burden of payment of costs.