

ORDER OF COURT

September 14, 1979, the motions for new trial and in arrest of judgment are denied. The Probation Office shall prepare a presentence investigation report and sentence is set for October 24, 1979.

COMMONWEALTH v. MILLER, C.P. Franklin County Branch,
Volume X, Page 245

Suspension of Operating Privileges - Regulations of Department of Transportation - Epilepsy

1. The Commonwealth must establish that a driver suffered an epileptic seizure and the driver's statement after the accident that she "supposed" she had a seizure is insufficient to establish the occurrence of a seizure.

Francis P. Bach, Esq., Assistant Attorney General, Attorney for the Commonwealth

R. Harry Bittle, Esq., Attorney for Defendant

OPINION AND ORDER

EPPINGER, P.J., September 20, 1979:

Kathleen Rose Miller's motor vehicle operating privileges were recalled by the Department of Transportation under a department regulation dealing with persons suffering from epilepsy.¹ This came after Kathleen Miller was involved in an accident where she ran off the roadway and struck an unattended vehicle. She was taken to a hospital where she told a state trooper that she blacked out and *supposed* that she had an epileptic seizure.

Kathleen Miller has a history of epilepsy, having had a dozen or less seizures during her lifetime. Typically when she's had such seizures, she gets nauseated, has a strange sensation and has an opportunity to get help because she recognizes these symptoms. If she had an epileptic seizure at the time of this accident, she did not have the usual forewarning. She requests

¹ "a person suffering from epilepsy shall not be issued an operator's license unless such person submits certification from their personal licensed physician of freedom from seizure for a period of at least one year immediately preceding with or without medication." Regulations of Department of Transportation, Title 67, Chapter 1, Sect. 103.6(a); 6 Pa. Bulletin 3053, effective December 11, 1976.

the court to set aside the recall of her operating privileges and restore them to her.

The petitioner has had an unblemished record as a driver (except for this incident) for more than 13 years. She lives in Chambersburg and drives daily to St. Thomas where she teaches school. Her testimony was that on this occasion she was pulling off the road to ask directions, hit the curb and doesn't remember anything after that. She says she struck her head.

The physician who treats the petitioner has known her for more than 10 years as a patient. He has prescribed medication that helps to control the seizures which she has had since childhood. Since 1975, with the medication, her situation is rather well controlled. Before these events she had 0 to 1 seizures per year. The onset seems to increase when she is excited, has trauma to her head or is running a temperature.

It was the doctor's opinion that she can safely operate a motor vehicle. The doctor supported this opinion by noting, as the evidence indicates, that her situation is fairly well controlled and also because she experiences an aura² before a seizure, permitting her to bring a vehicle to a halt if she feels the seizure coming on.

It is important to note that the Commonwealth did not establish that Mrs. Miller had a seizure. There was no testimony from hospital attendants that she suffered an epileptic seizure, nor were any records introduced to establish it. The only supporting testimony was that she told the trooper that she supposed she had a seizure. It is significant that she said she was pulling off the highway, struck the curb and bumped her head. According to the doctor's testimony that might have induced a seizure - a blackout. If that was the sequence of events, and there's no evidence to dispute it, then the accident occurred before the blackout and not as a result of the blackout, and might have been the result of careless driving or mistaken judgment as to the location of the curb. This explains the lack of notice to her if she did have a seizure. Even if she had a seizure, it is not established that it caused the accident.

While there are well-reasoned cases in the Common Pleas Courts where the withdrawal of driving privileges has been sustained, we think the case of *Commonwealth v. Miller*, (C. P.

² The one year period of freedom from seizures may be waived if a licensed neurologist or neurosurgeon so recommends and if, among other things, a specific prolonged aura which gives sufficient warning has been established. Regulations, *supra*, Sect. 103.6(c)(2).

Montgomery County) 89 D. & C. 486 (1954) made an appropriate disposition. Lewis Miller became dizzy while driving and pulled his car to the side of the road (and note that Kathleen Miller had pulled her car to the side of the road), where the wheels struck a bank and overturned. The cause of Lewis Miller's dizziness and unconsciousness was established to be an epileptic seizure. His previous seizures had been preceded by a warning.

At the hearing on appeal from the withdrawal of his driving privileges, Lewis Miller's physician said he was a safe driver as long as he continued on the medication. He needed his car for work and agreed to faithfully take his medicine.

Epilepsy may be described as a controllable handicap. In this era when we are attempting to allow handicapped people the full participation everyone else enjoys, what the Montgomery County Court said more than 20 years ago seems particularly enlightened:

We are convinced that there is no more risk of (Lewis Miller) causing injury to himself or others by reason of his epileptic condition than there is of the average driver who may suffer a heart attack, an apoplectic stroke or any one of a number of things that may cause a sudden loss of consciousness.

The court concluded that it was unjust to deprive a competent driver of the needed use of an automobile because of a rather remote possibility of having another seizure while driving. The case *Commonwealth v. Foulkrod*, 66 D. & C. 2d 679 (C. P. Forest County, 1973), using the same reasoning, reached the same result.

Kathleen Miller's notice recalling her operating privileges stated:

This decision has been made by comparing your physician's report with the standards recommended by our Medical Advisory Board and adopted by this department.

These standards were not presented to us, so we have no way of reviewing whether Kathleen Miller's physician's report did or did not compare favorably with the standards recommended by the Department's Medical Advisory Board.

For all these reasons, we will sustain the appeal of Kathleen Miller.

ORDER OF COURT

September 20, 1979, the appeal of Kathleen Rose Miller is sustained and the order of the Secretary of the Department of Transportation withdrawing her operating privileges is reversed.

Appellant shall pay the costs.

BAKNER v. BAKNER, C.P. Franklin County Branch, Eq. Doc., Vol. 7, Page 221

Equity - Partition - Appointment of Receiver - Stay of Execution

1. Where wife seeks partition of entireties real estate which are the subject of mortgage foreclosure action, and she has been excluded from the benefits of those properties, she is entitled to have a receiver appointed to collect rents and apply same to joint debts.

2. There is no distinction between threatened physical loss or destruction of property which would warrant the appointment of a receiver and threatened loss at Sheriff's sale.

Donald L. Kornfield, Esq., Attorney for Petitioner

Harvey C. Bridgers, Jr., Esq., Attorney for Respondent

John F. Nelson, Esq., Receiver

OPINION AND ORDER

KELLER, J., November 14, 1979:

This action in equity for partition of real estate and personal property allegedly owned by the parties was commenced by the filing of a complaint on September 27, 1979. Preliminary objections in the nature of a demurrer and motion for more specific pleading were filed on October 17, 1979. Argument has not been heard on the preliminary objections.

On September 27, 1979 Jean H. Bakner, plaintiff, petitioned the Court for the appointment of a receiver to receive the rents and profits from certain real estate located in the Borough of Waynesboro and Washington Township, Pennsylvania owned by the parties as tenants by the entireties. An order was signed on the same date directing the issuance of a rule upon T. E. Bakner, the respondent, to show cause why a receiver should not be appointed to take possession of the income producing properties, receive the rents and profits and pay the debts