COMMONWEALTH V. JONES C.P. Crim. Div. Franklin County Branch, No. 890 of 1990

Criminal Law--Driving While Under the Influence of Alcohol (75 Pa. C.S. 3731[a]) --Sufficiency of Evidence--Finding of Driving, Operating or in Actual Physical Control of the Movement of a Vehicle--Vehicle Parked and Engine Not Running When Defendant Observed--Commonwealth v. Price, 416 Pa. Super. 23, 610 A.2d 488 (1992), cited and distinguished--No Request for Special Interrogatory to Jury.

1. The standard of review on insufficiency of evidence, after a verdict favorable to the Commonwealth in criminal cases is whether, viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences in favor of the Commonwealth, there is sufficient evidence to find every element of the crime beyond a reasonable doubt.
2. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.
3. For a defendant to be convicted of DUI*, the Commonwealth must prove he or she was driving, operating, *or* in actual physical control of the movement of a vehicle.
4. *Commonwealth v. Price*, 416 Pa. Super. 23, 610 A.2d 488 (1992), which appears to hold that, *"at the very minimum,* a parked car should be started and running before a finding of actual physical control can be made," is distinguishable from the present situation.
5. In *Commonwealth v. Price, supra*, because of a negative response by the jury, to a special interrogatory posed to them, "driving" or "operating" were removed from the case, and the Commonwealth was required to prove beyond a reasonable doubt that the defendant was in actual physical control of the vehicle.
6. In the case at Bar, there was no such special interrogatory, and the jury were free to make a finding of guilt, on the basis that defendant had been operating, driving, *or* under actual physical control of the vehicle.
7. An engine does not have to be running for a jury to infer a defendant was driving or operating the vehicle.
8. In the instant case, there was evidence the vehicle was found, during daylight hours, parked partially blocking traffic patterns,

*Editor's Note: "DUI" means "Driving While Under the Influence."

> that the defendant's key was in the ignition, the radio was playing, and the defendant was in the driver's seat slouched over the steering wheel, and from this evidence the jury could have reasonably inferred that the defendant drove or operated the car to the place it was stopped.

John F. Nelson, District Attorney, Counsel for the Commonwealth
Kenneth E. Hankins, Jr., Esquire, Counsel for the Defendant

OPINION AND ORDER

WALKER, P.J., March 2, 1993:

FINDINGS OF FACT

A jury convicted the defendant, Donald L. Jones, of driving under the influence (hereinafter DUI) after a trial held July 17, 1992. Defendant filed post trial motions in arrest of judgment and for a new trial on November 2, 1992. The crux of defendant's argument is there was insufficient evidence to convict because the engine of the automobile was not running at the time it was observed by witnesses and the arresting officers. The court heard argument on the motions and the parties submitted briefs to the court. The matter is now ripe for disposition.

DISCUSSION

The following standard is used in reviewing claims of insufficiency of evidence:

> [W]hether, viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences in favor of Commonwealth, there is sufficient evidence to find every element of the crime beyond a reasonable doubt.... The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.

Commonwealth v. Griscavage, 512 Pa. 540, 543, 517 A.2d 1256, 1257 (1986).

For a defendant to be convicted of DUI, the Commonwealth must prove he or she was driving, operating, *or* in actual physical control of the movement of a vehicle. 75 Pa.C.S. 3731 (a). Defendant asserts he should be discharged because there was no evidence the engine had been running. In the alternative, defendant requests a new trial because the court erred in failing to charge that the defendant could be convicted of DUI only if the engine was running.

In support of this argument, defendant cites *Commonwealth v. Price,* 416 Pa.Super. 23, 610 A.2d 488 (1992), in which the court reversed a DUI conviction. In *Price,* the trial court submitted the following special interrogatory to the jury:

> Did you find beyond a reasonable doubt that defendant operated the vehicle on a public highway prior to the arrival of the police?

Id. at , 610 A.2d at 490. The jury's response was "no." *Id.* Thus, the Commonwealth was required to prove beyond a reasonable doubt that the defendant was in actual physical control of the vehicle. In finding the evidence insufficient to support a DUI conviction, the Superior Court reasoned, *"at the very minimum,* a parked car should be started and running before a finding of actual physical control can be made." *Id.*

In the instant case, the defendant's car was not running. However, there was no special interrogatory to determine whether the jury believed beyond a reasonable doubt that the defendant was driving or operating the vehicle, nor did the defendant request such an instruction. The court gave the standard DUI charge, including the Commonwealth's burden of showing beyond a reasonable doubt the defendant was operating, driving *or* under actual physical control of the vehicle. As a result, the Commonwealth was not relying solely on an actual physical control theory, which would have necessitated a finding that the car engine was running.

An engine does not have to be running for a jury to infer a defendant was driving or operating the vehicle. For example, suppose an individual charged with DUI is found on the side of a road with the front end of his car crushed and wedged underneath a large tree, but the engine is not running. The jury

could infer that the individual operated or drove the car into the tree. If the inference was impermissible, many individuals involved in a motor vehicle accident could not be convicted of DUI simply because the collision caused the engine to stop running.

In the instant case, the jury could have inferred from circumstantial evidence that the defendant had been driving or operating the vehicle. During the early evening hours of July 4, 1991, defendant's vehicle was observed stopped partially obstructing an intersection. Persons picnicking nearby noticed the vehicle was partially blocking traffic patterns and called the police department. Upon arrival at the scene, police observed the defendant's key in the ignition, the radio playing, and the defendant in the driver's seat slouched over the steering wheel.

Because the vehicle was partially blocking traffic during daylight hours, the jury could have inferred that the witneses noticed the truck shortly after it came to a stop. This, coupled with the fact the defendant was in the driver's seat with the key in the ignition and the radio playing, could have led the jury to conclude the defendant drove or operated the car to the place it was stopped.

Viewing the evidence in a light most favorable to the Commonwealth, the court finds there was sufficient evidence for the jury to reasonably infer the defendant was driving or operating the vehicle. Accordingly, defendant's post trial motions are denied.

ORDER OF COURT

March 2, 1993, defendant's post trial motions are denied.

The Franklin County Probation Department is directed to prepare and submit to the court a pre-sentence report on Donald L. Jones.

Donald L. Jones shall appear for sentencing at the call of the district attorney.