cide." *Commonwealth v. Taylor*, 461 Pa. 557, 562, 337 A.2d 545, 547 (1975).

In *Taylor* it was pointed out that malice lies somewhere between the recklessness or culpable negligence of involuntary manslaughter and the specific intent to kill of murder. It is wanton and reckless conduct manifesting an extreme indifference to the value of human life going beyond just negligent killing. From *Commonwealth v. Beattie*, 93 Pa. Super. 404, 408 (1928), it seems clear that if a defendant wantonly, recklessly and in disregard of the consequences drives his car into another and death results, consciousness of peril or probable peril to human life will be imputed to establish the element of malice required in murder.

The facts in this case establish that defendant, having threatened to kill himself and his girlfriend, intentionally drove into the car driven by Mr. Shew. It may be, as was argued, that this is either a case of first degree murder or involuntary manslaughter. If it is not involuntary manslaughter, as we have found, the court would not be prevented from deciding that the degree of guilt was third degree murder.

We think the evidence supports the court's decision that it is at least third degree murder. So the second argument, that the court unconstitutionally gave the Commonwealth the benefit of a presumption that upon the entering of the guilty plea, the defendant was guilty of murder of the third degree, putting the burden upon him to reduce it to voluntary or involuntary manslaughter, becomes academic.

However, it is the law of Pennsylvania that at a degree of guilt hearing the Commonwealth has the burden of presenting evidence to establish first degree murder and the defendant has the burden of reducing it to involuntary manslaughter, if that is what defendant contends his case is. *See, e.g., Commonwealth v. Geiger*, 475 Pa. 249, 254-55, 380 A.2d 338, 340 (1977); *Commonwealth v. Moore*, 473 Pa. 169, 173, 373 A.2d 1101, 1103 (1977); *Commonwealth v. Ewing*, 439 Pa. 88, 91, 264 A.2d 661, 662 (1970).

But, says the defendant, relying on *Mullaney v. Wilbur*, 421 US 684, 44 L.Ed 2d 508, 95 S.Ct. 1881 (1975), that can't be. In *Mullaney* the court was dealing with a Maine statute which required a defendant charged with murder to prove that he acted in the heat of passion or sudden provocation in order to reduce the homicide to manslaughter. The court found that the rule violated the Due Process Clause of the Fourteenth Amendment that the prosecution prove beyond a reasonable

doubt every fact necessary to constitute the crime charged and concluded that it was the state's burden to prove beyond a reasonable doubt the absence of the heat of passion or sudden provocation when the issue was properly presented. In that case, of course, the defendant had entered a plea of not guilty and was entitled to the presumption of innocence and the state was required to prove every element of the offense of which he was convicted beyond a reasonable doubt.

In this case, the defendant has already said he is guilty of some degree of homicide. If we accepted the argument of the defendant it would change the law of Pennsylvania. For instead of the plea constituting a plea to third degree murder, it would be a plea to involuntary manslaughter, which is the lowest grade of homicide.

For these reasons we deny the defendant's motions for a new degree of guilty hearing and in arrest of judgment.

ORDER OF COURT

March 18, 1981, it is ordered that defendant's motions for a new degree of guilt hearing and arrest of judgment are denied. The defendant shall appear before the court on April 1, 1981 to be sentenced.

COMMONWEALTH v. DESMOND, C.P. Franklin County Branch, No. 291 of 1980

Criminal Law - Vehicle Code - Driving Under Influence - Definition of "Drive"

1. The Vehicle Code in using the word "drive" instead of the word "operate" imposes a burden upon the Commonwealth to prove beyond a reasonable doubt the actual movement of a motor vehicle.

2. The fact that a private citizen, without any evidence of authority, urged the defendant to move his vehicle from a position of danger is no excuse for the defendant driving his vehicle.

David W. Rahauser, Assistant District Attorney, Counsel for the Commonwealth

E. Franklin Martin, Esq., Counsel for Defendant

OPINION AND ORDER
POST TRIAL MOTIONS

KELLER, J., March 19, 1981:

On June 24, 1980, the defendant was charged with driving under the influence and after a preliminary hearing before District Justice of the Peace Mabel Shoemaker was bound over for court. He was arraigned on November 17, 1980, and on October 1, 1980 presented his Omnibus Pre-Trial Motion in the nature of a motion to suppress evidence. A hearing was held on the Omnibus Pre-Trial Motion on October 28, 1980 at 1:30 o'clock P.M., and on November 5, 1980 the Order of Court together with Findings of Fact, Discussion and Conclusions of Law was filed dismissing the pre-trial motion. The case was tried by jury on January 15, 1981, and the defendant was found quilty. Motions for a new trial and in arrest of judgment were filed on January 23, 1981. With approval of the Court the post trial motions were submitted on briefs of counsel for the defendant and the Commonwealth without oral argument.

The grounds asserted by the defendant in both post trial motions are:

1. The verdict was against the evidence.

2. The verdict was against the weight of the evidence.

3. The verdict was against the law.

4. The Honorable Court erred in overruling objections made on the record by or on behalf of the defendant to the introduction of opinion evidence by the witness, David L. Stoner.

5. The Honorable Court erred in dismissing the Omnibus Pre-Trial Motion timely filed by the defendant.

6. The Honorable Court erred in failing to sustain defendant's demurrer to the evidence.

7. The Honorable Court erred in failing to charge the jury, pursuant to Defendant's Points for Charge which were attached to and made a part of the post trial motions.

The Point for Charge attached to the defendant's post trial motions provides:

> "The word 'drive' in the statute does not embrace any move-

> ment of the car under its own power. If you find the Defendant moved his vehicle to get it out of the way of a dangerous situation and only to move the vehicle to a place of safety, you cannot find that the Defendant drove the car in the meaning of the statute."

In the margin of the Charge appears:

> "Refused 1-13-81 - Inapplicable to facts in *People v. Kelley* 70 P2d 276. Incorrect as a matter of law under facts presented. John W. Keller."

The defendant asserts in his brief that his argument under post trial motion No. 1 is the same and incorporated under post trial motion Nos. 2 and 3. We will, therefore, address ourselves to post trial motions 1, 2 and 3 together.

The issue raised by the defendant under these three post trial motions is whether he "drove" his vehicle within the meaning of the statute. He correctly asserts that the Legislature changed the language of the driving under the influence section of the Vehicle Code when it adopted the current Motor Vehicle Code by changing the language from "operate" his vehicle while under the influence to "drive." Under the prior Vehicle Code our appellate courts had determined that the simple controlling of the moving parts of the motor vehicle was sufficient to constitute the "operation" of a motor vehicle. We agree with the defendant's contention that the substitution of the word "drive" or "drove" imposes a burden upon the Commonwealth to prove beyond a reasonable doubt the actual movement of a motor vehicle.

The defendant cites the California case of *People v. Kelly*, 27 Cal. App. 2nd Supp 771, 70 P2d 276 (1937) in which the court held that the defendant did not drive his vehicle when he got into it, started the engine and moved the vehicle several feet to a place out of the way of traffic. The court observed that the California statute was not broad enough to cover the many acts of operating, moving, or propelling a vehicle which was not driving. In reliance on this case the defendant contends that he was moving his vehicle at the direction of a passing motorist, and only moved it a matter of feet and that could not constitute driving. Consequently, the verdict was against the evidence, the weight of the evidence and against the law; and the Court must either arrest judgement or award the defendant a new trial.

The Court does not have the benefit of a transcribed record, but from its notes it appears that about 9:00 P.M. on

June 24, 1980 a private citizen driving East on Route 16 and approaching the I-81 overpass observed a vehicle blocking both eastbound lanes of Route 16. He stopped and waited for the vehicle to move, but it remained in a stationery position. The citizen put on his four-way flashers and twice called to the operator of the other vehicle to "move your car." The vehicle then moved forward across the eastbound lanes and into a reflector sign positioned in the medial strip between the east and west bound lanes of the highway and stopped. Once again the citizen told the operator to move the car. When the operator spun his wheels against the reflector sign, which was approximately 4 to 5 feet high and bent it, again the citizen told the operator to move his car off the highway before he hurt someone. The operator then backed up and stopped; again blocking both of the eastbound lanes of the highway. The citizen then approached the vehicle; the defendant got out and the citizen offered to move the vehicle off the highway; accepted the car keys from the defendant and parked it on the south berm of the highway. He retained the car keys.

In our judgment the voluntary driving of the vehicle by the defendant from its stopped position blocking both east-bound lanes to and into the medial strip and against the reflector sign; the spinning of the wheels against the sign; and the backing of that vehicle across the eastbound lanes of the highway constituted driving a motor vehicle within the language of the statute and the intention of the Legislature. The fact that a private citizen, without any indicia of authority, urged the defendant to move his vehicle from a position of danger to himself and the traveling public would not constitute an excuse or a justification for the defendant driving that vehicle.

Therefore, post trial motions 1, 2 and 3 are dismissed.

In his fourth trial motion the defendant contents himself with arguing that the prosecutor did not lay a proper foundation to permit the private citizen, David L. Stoner, to testify that it was his opinion that the defendant was under the influence. Therefore, the Court should have sustained his objection to permitting the witness to testify as to his opinion on the subject.

According to the Court's notes the witness testified that when the defendant exited his vehicle the witness smelled a strong odor of alcohol on him, and observed that the defendant staggered to the side of the road. He also testified that he had seen people under the influence of alcohol many times. In our judgment this constituted a sufficient foundation to permit a lay witness to express the opinion that from his observations,

including the defendant's driving manner, that the defendant was not himself and was under the influence of alcohol.

Therefore, post trial motion No. 4 is dismissed.

In defendant's post trial motion No. 5, he contends that the Court erred in dismissing the Omnibus Pre-Trial Motion on the grounds that the facts and circumstances within the knowledge of the officer were not sufficient to form a belief that the defendant had committed a crime.

The Court filed a rather exhaustive statement of Findings of Fact and Discussion, and it is incorporated herein by reference thereto. We feel nothing further is required by way of response to the contention.

Post trial motion No. 5 is dismissed.

With regard to post trial motion No. 6 that the Court erred in failing to sustain defendant's demurrer to the evidence, the defendant asserts in his brief that he relies on the argument presented in support of post trial motions 1, 2 and 3, and incorporates them in support of No. 6.

The defendant testified in his own behalf and called one witness after his demurrer was denied. It is hornbook law that once a defendant asserts a defense the Court will give no further consideration to a demurrer. *Commonwealth v. Cristina*, 481 Pa. 44 (1978).

Therefore, post trial motion No. 6 is dismissed.

In support of post trial motion No. 7 the defendant asserts in his brief that "the argument and authority for this issue is the same as argued in Argument No. 1, and, therefore, Argument No. 1 is incorporated herein as if written in full."

Having therefore concluded that the defendant's argument in support of his first three post trial motions is without merit, we also conclude that post trial motion No. 7 is without merit and is dismissed.

ORDER OF COURT

NOW, this 19th day of March, 1981, the Defendant's Post Trial Motions in Arrest of Judgment and for a New Trial are dismissed.

The Franklin County Probation Department is directed to

make a Pre-Sentence Investigation and prepare and file a Pre-Sentence Investigation Report. The District Attorney shall upon the filing of the Pre-Sentence Investigation Report schedule the Defendant to appear for sentencing.

Exceptions are granted the Defendant.

EDITOR'S NOTE

We have now completed the advance sheets for Volume 4 of the Journal. We have had to publish more than 52 issues this time because of our Board's decision to print proposed local rules of Court. They appear only in the advance sheets, but, for budgetary reasons, were inserted in place of opinion pages, thus stretching out the printing time involved. Bound Volume 4 will take a few months to prepare, but you should get your orders for extra copies in as quickly as possible, in order to help us with our planning.