In the Superior Court of Pennsylvania

No. 139 EDA 2021

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

RAHSAAN O. MAY,

Appellant

BRIEF FOR APPELLANT,
THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE JUDGMENT OF SENTENCE ENTERED ON NOVEMBER 23, 2020 BY THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, THE HONORABLE G. MICHAEL GREEN, AT CP-23-CR-0004281-2018.

FREDERICK J. STOLLSTEIMER
District Attorney

D. DANIEL WOODY
Assistant District Attorney
District Attorney's Office
201 West Front Street
Media, PA 19063
(610) 891-3971
Attorney for Appellee

September 24, 2021

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

RULES

STATUTES

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

The Commonwealth charged the Appellant with Driving Under the Influence (75 Pa.C.S. § 3802(d)(1)(i)), which incriminates driving with "any amount" of a Schedule I controlled substance in the bloodstream. Chemical testing revealed the Appellant's blood contained a Schedule I controlled substance. Nevertheless, the Appellant attempted to present expert testimony concerning his impairment even though his expert would not refute the results of the chemical testing. Did the trial court properly exclude the testimony as irrelevant?

(The trial court answered yes.)

The trial court was required to impose a $1,000 mandatory fine. However, the Appellant claims that the fine was unlawful because the trial court did not conduct an inquiry into his ability to pay. Our appellate court have already held that a trial court cannot consider a defendant's ability to pay when imposing a mandatory fine. Did the trial court properly impose the mandatory fine?

(The trial court answered yes.)

COUNTER-STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

A. Motion in Limine

This Court employs an abuse of discretion standard of review when examining a trial court's ruling on the admission of evidence. *Commonwealth v. Flor*, 606 Pa. 384, 414, 998 A.2d 606, 623 (2010). "[A]n abuse of discretion is not simply an error of judgment but an overriding misapplication of the law. Further, an abuse of discretion will [not] be found . . . [unless] the trial court's judgment was manifestly unreasonable or the result of partiality, prejudice, bias, or ill will as shown by the evidence of record." *Commonwealth v. Benson*, 10 A.3d 1268, 1274 (Pa. Super. 2010). Appellate courts "cannot overturn a trial court's discretionary ruling merely because [it] might have reached a different conclusion." *Id*. The scope of review of a trial court's evidentiary rulings is limited to the relevant portions of the trial record. *See Flor*, 606 Pa. at 415-416, 998 A.2d at 624-625.

B. Imposition of Fines

A challenge to the imposition of a fine implicates the legality of the sentence. *Commonwealth v. Boyd*, 73 A.3d 1269, 1271 (Pa. Super. 2013) (*en banc*). These claims are non-waivable "if the defendant alleges that there was no evidence of record concerning the defendant's ability to pay." *Id*. at 1270. If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to

correction. An illegal sentence must be vacated. *Commonwealth v. Leverette*, 911 A.2d 998, 1001 (Pa. Super. 2006). The determination as to whether the trial court imposed an illegal sentence is a question of law; therefore, the scope of review is plenary and the standard of review is de novo. *Commonwealth v. Lomax*, 8 A.3d 1264, 1267 n.3 (Pa. Super. 2010).

COUNTER-STATEMENT OF THE CASE

A. Procedural History

On February 28, 2018, Pennsylvania State Troopers arrested the Appellant, Rahsaan May, and charged him with Driving Under the Influence ("DUI").[1] The Appellant consented to chemical testing, the result of which demonstrated that the Appellant had 5 nanograms of the active constituent of marijuana in his blood and 62 nanograms of the inactive metabolite in his blood.[2]

The case proceeded to a nonjury trial. Before trial, the Commonwealth filed a Motion *in Limine* to exclude the testimony of Appellant's expert, Lawrence Guzzardi, M.D. The Appellant contended his expert would dispute the observations of the police officer on scene and advance the theory that the admitted "levels of marijuana are so insignificant that nobody can be . . . found to drive [impaired]" with such a trivial amount of marijuana in his blood. Tr. 10/14/20, 25; *see also* Def. Memorandum 10/2/20). The Appellant repeatedly advised the trial court that Dr. Guzzardi would challenge neither the methodology behind the chemical testing of the Appellant's blood, nor the findings that the Appellant had a Schedule I controlled substance in his blood while driving. Tr. 10/14/20, 11-12, 15, 18-19, 23.

In granting the Motion *in Limine* and excluding the Appellant's expert, the

[1] 75 Pa.C.S. § 3802(d)(1)(i) (driving a vehicle with any amount of a Schedule I controlled substance in the driver's blood)

[2] The active constituent is delta-9-THC, and the inactive constituent is 9-carboxy-THC.

trial court made the following findings-of-fact:

> First, the Commonwealth is proceeding under Title 75, Section 3802(d)(1)(i), and not under Title 75 Section 3802(d)(2). For this reason, the Commonwealth's Motion *in limine* to preclude the use of the expert report and testimony pursuant to that report of Dr. Guzzardi is granted. Dr. Guzzardi's testimony is precluded for two reasons. One, it is not relevant given the information the Commonwealth is proceeding upon under Rule 401. Evidence is relevant if, A, it has any tendency to make a fact more or less probable than it would be without the evidence; and B, the fact is of consequence in determining the action. Here, it's also important to note that the testimony of Dr. Guzzardi would in effect, if it's consistent with the report, admit an essential element of the proof in the Commonwealth's case. That is that any level of marijuana or its metabolite was present in the blood of the Defendant based upon the sample drawn at or about the time of the motor vehicle collision with an overhead structure, which is the subject of this criminal case.

Id. at 26-27. And later continued:

> I'd like to read for the record Pennsylvania Rule of Evidence 803(25)(C). "Exceptions to the rule against hearsay regardless of whether the declarant is available as a witness. The following are not excluded by the rule against hearsay regardless of whether the declarant is available as a witness: #25, an opposing party's statement. The statement is offered against an opposing party and (C) was made by a person whom the party authorized to make a statement on the subject." In this case, were Dr. Guzzardi to testify based upon the argument I've heard today, Dr. Guzzardi would say that the blood draw from Mr. May at or about the time of the motor vehicle accident in which it's alleged Mr. May was operating a motor vehicle which struck an overhead structure, that that blood sample included some level of marijuana or its metabolites. That admission would corroborate the Commonwealth's case. I understand that the defense intends a constitutional challenge to Title 75, Section 3802(d)(1)(i). Nevertheless, this Court is constrained by the requirements of that statute. And Ms. Latonick on behalf of the Commonwealth has accurately recited the essential elements and the proof necessary on the part of the Commonwealth, including its burden, to prevail.

Id. at 31-32.

The Commonwealth ultimately convicted the Appellant of DUI and the trial court sentenced him to six months of probation and ordered him to pay a $1,000 mandatory fine. The Appellant filed a timely post-sentence motion, which was denied, and this timely appeal followed. On appeal the Appellant challenges the exclusion of Dr. Guzzardi's testimony and the imposition of the mandatory fine.

B. Factual History

The trial court, as finder-of-fact in the Appellant's non-jury trial, summarized the trial evidence as follows:

> At trial, the Commonwealth first called Bret Flaherty as a witness. (10/14/20 N.T., pp. 33). On February 28, 2018 at approximately 8:30 a.m., Mr. Flaherty was traveling on King Prussia Road, Radnor Township, Delaware County, Pennsylvania underneath an overpass when "out of nowhere a truck came slamming down onto my car." (10/14/20 N.T., p. 35). Mr. Flaherty accelerated to escape the truck but his vehicle sustained significant damage and was "totaled." (10/14/20 N.T., p. 35). Mr. Flaherty testified had he been even a second later in driving under the overpass, the truck "would have hit lower and probably would have just killed me." (10/14/20 N.T., p. 38). Mr. Flaherty is familiar with that roadway and noted there are multiple signs advising of the bridge height and he confirmed the bridge itself is painted yellow. (10/14/20 N.T., pp. 35 & 37).
>
> The Commonwealth next called Radnor Township Police Officer Alex Janoski to testify. (10/14/20 N.T., p. 41). Officer Janoski is a fifteen (15) year veteran of the Radnor Township Police Department currently assigned to the Highway Patrol Unit. (10/14/20 N.T., p. 42). He is responsible for enforcing motor vehicle violations, investigating alleged impaired drivers and accident reconstruction. Officer Janoski has been trained in both standardized field sobriety and advanced roadside

impaired driving enforcement. (10/14/20 N.T., p. 42, 46 & 98).

On February 28, 2018, Officer Janoski was on patrol operating a marked police motorcycle and was dispatched to the accident scene involving the overturned truck on King of Prussia Road. (10/14/20 N.T., p. 48). King of Prussia Road is a two-lane state highway with multiple signage warning of the 10'10" bridge clearance. (10/14/20 N.T., pp. 48-49). Officer Janoski observed the white box truck on its side under the bridge. (10/14/20 N.T., p. 51). At trial, Officer Janoski identified Appellant May as the driver of the white box truck. (10/14/20 N.T., p. 52). On scene, Officer Janoski inquired if Appellant May required medical attention which was declined. (10/14/20 N.T., p. 55). Appellant May advised he was following a GPS map on his phone and did not notice the signs warning of the bridge height. (10/14/20 N.T., p. 56).

While speaking with Appellant May, Officer Janoski detected the odor of burnt marijuana. (10/14/20 N.T., p. 56). Officer Janoski also observed Appellant May presented with red, bloodshot, and glassy eyes. (10/14/20 N.T., p. 56). Officer Janoski inquired if Appellant May had smoked anything that day and Appellant May responded: "I smoked a little weed this morning." (10/14/20 N.T., p. 61). During the interview, Appellant May placed his hands in his pockets after Officer Janoski requested on several occasions he leave his hands visible. (10/14/20 N.T., p. 63). An officer safety pat down was performed and suspected marijuana was located on Appellant May's person. (10/14/20 N.T., p. 64). Officer Janoski requested Appellant May submit to standardized field sobriety testing. (10/14/20 N.T., p. 65). Based on his training and experience, Officer Janoski had reasons to suspect Appellant May was under the influence, including but not limited to the smell of burnt marijuana, Appellant's admission to smoking that very morning, and the presence of the suspected marijuana obtained following the safety pat down. (10/14/20 N.T., pp. 65 & 107). Appellant May was placed under arrest for suspicion of driving under the influence. (10/14/20 N.T., p. 65).

Officer Janoski requested Appellant May submit to a blood draw. (10/14/20 N.T., p. 66). Appellant May was advised of his implied consent to chemical test warnings and agreed to the blood draw. (10/14/20 N.T., p. 66 & C-6). Appellant May was transported to Bryn Mawr Hospital where Officer Janoski read the DL-26B form verbatim to

Appellant May. (10/14/20 N.T., p. 66 & 68, C-6). Once the blood was drawn by a nurse, it was secured by Officer Janoski in a DRUGSCAN kit, returned to Radnor Township Police Department, logged into temporary evidence and ultimately conveyed for analysis. (10/14/20 N.T., p. 68).

The Commonwealth's final witness was Dr. Richard Cohn. (10/14/20 N.T., p. 135). The trial court determined Dr. Cohn was qualified to offer expert opinion testimony in the field of forensic toxicology based on his scientific, technical and other specialized knowledge. (10/14/20 N.T., p. 150). Dr. Cohn is a forensic toxicologist employed with DRUGSCAN. (10/14/20 N.T., p. 136). DRUGSCAN is a forensic toxicology laboratory certified both federally and by the Commonwealth of Pennsylvania. (10/14/20 N.T., p. 150 & C-7).

Dr. Cohn examined Appellant May's laboratory specimen submitted by Radnor Township Police Department and authored a forensic toxicology report dated April 4, 2018. (10/14/20 N.T., p. 154 & 157, C-8). Dr. Cohn testified that marijuana was present in the sample of Appellant May's blood submitted by Radnor Township Police:

> Dr. Cohn: Cannabinoids or marijuana. Findings are as follows: 5 nanograms, delta-9-THC, which is the active constituent -- pharmacologically active constituent of marijuana for mL blood. That's nanograms per mL blood, and 62 nanograms of the 9-carboxy-THC, which is the inactive metabolite for mL blood. Those were the findings relative to cannabinoids or marijuana. (10/14/20 N.T., p. 158).

Dr. Cohn confirmed delta-9-THC is the principal psychoactive ingredient of marijuana, a Schedule I controlled substance. (10/14/20 N.T., p. 159). It is metabolized as a non-psychoactive compound delta-9-carboxy-THC. (10/14/20 N.T., p. 159).

Appellant May elected not to testify but argued in closing the marijuana detected in his blood on the day of the accident was so low as to have no psychoactive effects nor did it impair his ability to operate a motor vehicle. (10/14/20 N.T., p. 230). The Commonwealth argued on February 28, 2018 Appellant Rahsaan May drove, operated, and was in active physical control of a box truck, on King of Prussia Road in Radnor

> Township, Delaware County, Pennsylvania, and he did so after he consumed marijuana, a Schedule I controlled substance. (10/14/20 N.T., p. 239). The trial court found Appellant May guilty of 75 Pa.C.S. § 3802(d)(1)(i) and he was sentenced to a period of twenty (20) days of electronic home monitoring, eighty (80) hours community service, required to undergo a CRN evaluation and complete safe driving classes. Appellant May was fined $1000.00 and $168.00 in costs were assessed. (10/14/20 Verdict Slip & 11/23/20 Certificate of Imposition of Sentence).

Op., 6-11.

SUMMARY OF THE ARGUMENT

The Commonwealth sought to convict the Appellant of DUI under 75 Pa.C.S. § 3802(d)(1)(i), which incriminates driving a vehicle with "any amount" of a Schedule I controlled substance in the driver's blood. The Appellant consented to chemical testing which demonstrated that he had a Schedule I controlled substance in his blood. Nevertheless, the Appellant wanted to call an expert witness to testify that it did not matter that the Appellant had a Schedule I controlled substance in his blood, that the amount was not enough to render him intoxicated. The Commonwealth filed a motion *in limine* to exclude this testimony and the trial court properly granted the motion because Appellant's expert's testimony was not relevant. The Appellant repeatedly conceded that his expert would not testify concerning the methodology behind the chemical testing of the Appellant's blood, nor the findings that the Appellant had a Schedule I controlled substance in his blood while driving. Therefore, and the trial court properly excluded it.

The trial court imposed a $1,000 mandatory fine. The Appellant claims that the fines were unlawful because the trial court did not conduct an inquiry into his ability to pay. However, our appellate courts have already held that a trial court cannot consider a defendant's ability to pay when imposing a mandatory fine.

ARGUMENT

A. Because the Appellant conceded that his expert would not refute the uncontradicted fact that the Appellant was driving a vehicle with a Schedule I controlled substance in his blood, the expert's testimony was not relevant.

The Appellant claims that the trial court erred by granting the Commonwealth's motion *in limine* and precluding the testimony of the Appellant's toxicologist, Dr. Lawrence Guzzardi. Appellant's Br., 12-18. He is wrong. The Appellant conceded that Dr. Guzzardi would not testify concerning the methodology behind the chemical testing of the Appellant's blood, nor the findings that the Appellant had a Schedule I controlled substance in his blood while driving. Therefore, Dr. Guzzardi's testimony was not relevant and the trial court properly excluded it.

The standard of review regarding challenges to the admission of evidence is well-established. The admissibility of evidence is a matter directed to the sound discretion of the trial court, and an appellate court may reverse only upon a showing that the trial court abused its discretion. *Commonwealth v. Pattakos*, 754 A.2d 679, 681 (Pa. Super. 2000) (*quoting Commonwealth v. Robinson*, 554 Pa. 293, 304, 721 A.2d 344, 350 (1998)). In keeping, decisions concerning the admissibility of expert testimony is left to the sound discretion of the trial court, which will not be disturbed absent an abuse of that discretion. *Commonwealth v. Towles*, 630 Pa. 183, 208, 106 A.3d 591, 605 (2014). "An expert opinion may be based on inadmissible facts or

facts not in evidence, including other expert opinions and hearsay statements, as long as such facts are a type reasonably relied on by experts in that profession." *Id*. (*citing* Pa.R.E. 703). The trial court has the discretion "to make a preliminary determination as to whether the particular underlying facts are the kind reasonably relied upon by experts in the particular field." *Id*.

It does not matter if another trial court judge might have ruled differently or if the appellate court judges would have ruled differently if confronted with the same evidentiary issue in a different trial. That is not the measure of an abuse of discretion. "Discretion is abused when the course pursued by the trial court represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is the result of partiality, prejudice, bias or ill will." *Commonwealth v. Albrecht*, 554 Pa. 31, 52, 720 A.2d 693, 704 (1998) (*quoting Coker v. S.M. Flickinger Co.*, 533 Pa. 441, 448, 625 A.2d 1181, 1185 (1993)).

Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding a material fact. *Commonwealth v. Kinard*, 95 A.3d 279, 284 (Pa. Super. 2014) (*en banc*); *see also* Pa.R.E. 401.

An individual is guilty of DUI under subsection 3802(d)(1)(i) if he is driving a vehicle with "any amount of a . . . schedule I controlled substance" in his blood.

75 Pa.C.S. § 3802(d)(1)(i). "There is no constitutional right to the use of marijuana prior to driving; indeed . . . an individual is prohibited from any use of marijuana." *Commonwealth v. Etchison*, 916 A.2d 1169, 1173 (Pa. Super. 2007). "[A] conviction under section 3802(d)(1) does not require that a driver be impaired; rather, it prohibits the operation of a motor vehicle by *any* driver who has *any* amount of specifically enumerated controlled substances in his blood, regardless of impairment." *Id*. at 1174 (emphasis in original). In *Etchison*, this Court upheld the defendant's conviction under subsection 3802(d)(1)(i) even though the defendant did not have any of the active component of marijuana in his bloodstream; rather, he only had the inactive cannabinoid metabolite, which can remain present in a person's blood for months after use. *Id*. at 1172-73. This Court ultimately held that the Commonwealth was not required to present evidence of impairment to convict an individual under subsection 3802(d)(1)(i). *Id*. at 1174 ("A conviction under subsection 3802(d)(1) does not require a driver to be impaired . . . .").

Because the DUI subsection at issue (§ 3802(d)(1)(i)) incriminates a defendant if he has any amount of a Schedule I controlled substance in his blood, the Appellant's proposed toxicologist's testimony was not relevant. The Appellant argues that Dr. Guzzardi's testimony could have impeached the police officer's testimony at trial concerning the Appellant's purported signs of impairment. This argument is a red herring. The officer's testimony concerning signs of impairment was not

relevant to convict the Appellant and neither was Dr. Guzzardi's alleged counter-testimony. The signs of impairment may have arguably been relevant in proving probable cause to arrest and to request chemical testing, but the conviction was based on the results of the chemical testing and the evidence demonstrating the Appellant was driving the vehicle with marijuana in his bloodstream. Outward signs of impairment are not necessary for a conviction under subsection 3802(d)(1)(i) when the Commonwealth has the results of chemical testing showing a Schedule I controlled substance in the driver's blood. *See Etchinson*, *supra*.

Similarly, the Appellant is wrong that Dr. Guzzardi could have contradicted the Commonwealth's expert testimony in any relevant way. Dr. Guzzari needed to attack the methodology of the laboratory findings in order to offer relevant testimony. He needed to conclude that there was in fact **no** Schedule I controlled substances in the Appellant's blood or he needed to argue that Dr. Cohn's report's conclusion was unreliable; otherwise, his testimony was irrelevant. Instead, as the trial correctly recognized, Dr. Guzzardi's testimony was arguably only relevant to convict the Appellant:

> Here, it's also important to note that the testimony of Dr. Guzzardi would in effect, if it's consistent with the report, admit an essential element of the proof in the Commonwealth's case. That is that any level of marijuana or its metabolite was present in the blood of the Defendant based upon the sample drawn at or about the time of the motor vehicle collision with an overhead structure, which is the subject of this criminal case.

Tr. 10/14/20, 26-27.

Next, the Appellant's argument that Dr. Guzzardi's proposed testimony could have permitted the defense to argue that the DUI prosecution should be dismissed as *de minimus* is incorrect. Appellant's Br., 12 (*citing* 18 Pa.C.S. § 312).[3] Section 312 was enacted for petty offenses where there was no harm caused to a victim or society. *In re R.W.*, 855 A.2d 107, 109-10 (Pa. Super. 2004). But here the Appellant almost killed a man. Bret Flaherty, who was traveling in the lane next to the Appellant, testified had he been even a second later in driving under the overpass, the truck "would have hit lower and probably would have just killed me." Tr. 10/14/20, 38. Furthermore, the Appellant's conduct fit the plain language of the DUI statute, and individuals can be convicted under 75 Pa.C.S. § 3802(d)(1)(i) even when, unlike here, the individual only has the marijuana metabolite in his blood, not the active

[3] (a) General rule. The court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the conduct of the defendant:

> (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;
>
> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the General Assembly or other authority in forbidding the offense.

18 Pa.C.S. § 312.

compound. Finally, a DUI is not a petty offense but instead is one in which the citizenry is consistently and significantly concerned about preventing.

The Appellant was guilty under subsection 3802(d)(1)(i) because he operated a vehicle with a Schedule I controlled substance in his blood. Dr. Guzzardi's testimony would only be relevant if he was testifying that the Commonwealth laboratory expert improperly concluded that there was a Schedule I controlled substance in the Appellant's blood. However, the Appellant repeatedly advised the trial court that Dr. Guzzardi would challenge neither the methodology behind the chemical testing of the Appellant's blood, nor the findings that the Appellant had a Schedule I controlled substance in his blood while driving. Tr. 10/14/20, 11-12, 15, 18-19, 23.

The plain language of subsection 3802(d)(1)(i) and the cases interpreting it are abundantly clear: if an individual has any amount of a Schedule I controlled substance in his blood and he is driving, then he is guilty. The Commonwealth in its equal enforcement of the law and the trial court in its equal application of the law cannot choose to disregard the unambiguous language of subsection 3802(d)(1)(i) and this Court's holdings concerning that subsection. Marijuana is a Schedule I controlled substance and the General Assembly has prohibited everyone from driving with a Schedule I controlled substance in his or her bloodstream.

The Appellant's theory that the admitted "levels of marijuana are so insignificant that nobody can be . . . found to drive [impaired] under" such low levels of

consumption is not a defense in a prosecution under subsection 3802(d)(1)(i) when the Commonwealth has uncontradicted evidence that the driver had a Schedule I controlled substance in his blood. Whether the Drug Enforcement Administration should recommend amending the Controlled Substances Act[4] to reclassify marijuana into a different schedule, or whether the General Assembly should allow citizens to drive with some amount of marijuana in their system, are questions for the DEA and the General Assembly; these questions cannot be answered by Dr. Guzzardi or the Appellant however rational their argument may be.

Absent testimony that the Commonwealth's expert was wrong in his conclusion that the Appellant had a Schedule I controlled substance in his blood while driving, Dr. Guzzardi's testimony was irrelevant.

* * *

The Appellant's citation to *Commonwealth v. Taylor*, 209 A.3d 444 (Pa. Super. 2019) is misplaced. *Taylor* concerned a different subsection of the DUI statute, namely 75 Pa.C.S. § 3802(d)(2). 209 A.3d at 446 n.1. Critically, the defendant in *Taylor* did not submit to chemical testing; thus, there was no evidence that the defendant had any amount of a Schedule I controlled substance in her blood. *Id*. at 447.

The prosecution in *Taylor* centered around the defendant's erratic driving and her admission that she consumed Xanax and Adderall, which are Schedule IV

[4] 21 U.S.C. § 812

controlled substances. *Id*. The defense introduced evidence that the defendant was lawfully prescribed Xanax and Adderall. *Id*. at 448. Unlike Schedule I controlled substances, it is not illegal for a citizen to operate a vehicle with any amount of a Schedule IV controlled substance in his blood. Thus, in *Taylor* and unlike the instant case, expert testimony concerning the impairing effects of the medication was relevant to convict or acquit the defendant.

B. A trial court cannot consider a defendant's ability to pay a fine when imposing a mandatory fine.

The Appellant's second claim concerns the imposition of a $1,000 mandatory fine. Appellant's Br., 18-42. He claims that the fine was unlawful because the trial court did not conduct an inquiry into his ability to pay. However, our Supreme Court has already held that a trial court cannot consider a defendant's ability to pay when imposing a mandatory fine.

An individual convicted of DUI under subsection 3802(d) as a first offense, "**shall be** sentenced . . . to . . . pay a fine of not less than $1,000 nor more than $5,000." 75 Pa.C.S. § 3804(b)(1) (emphasis supplied).

"A trial court is not required to consider a defendant's ability to pay when imposing mandatory fines." *Commonwealth v. Kress*, 2020 WL 6778992 at *3 (Pa. Super. Nov. 18, 2020) (non-precedential decision) (*citing Commonwealth v. Ford*, --- Pa. ---, 217 A.3d 824, 827 (2019) & *Commonwealth v. Gipple*, 418 Pa.Super.

119, 613 A.2d 600, 601 n.1 (1992)). Although it is an unpublished opinion, the defendant in *Kress* raised an identical argument to the Appellant in the instant matter, positing: "Did the trial court impose an illegal sentence in ordering [Kress] to pay $2,525 in fines where the record included no evidence that [Kress] could afford to pay the fines imposed?" *Kress*, 2020 WL 6778992 at * 2 (*quoting* defendant Kress's brief) (quotation marks omitted). This Court rejected Kress's challenge and held that no inquiry into an ability to pay is required and the sentence was legal. *Id*. at *3.

The Appellant argues that 75 Pa.C.S. § 9726(c)[5] should force a trial court to disregard a mandatory fine if a defendant cannot afford to pay the fine. However, our appellate courts have already rejected that argument. *Ford*, --- Pa. ---, 217 A.3d at 827 ("a presentence hearing on the ability to pay a mandatory fine is not required"); *citing Gipple*, 613 A.2d at 601 n.1 (section "9726(c) does not apply to [a] . . . mandatory fine provision"); *see also Commonwealth v. Cherpes*, 360 Pa. Super. 246, 265-66, 520 A.2d 439, 449 (1987) (the specific, mandatory fine provision in a criminal statute controls over the general requirement to hold an ability to pay hearing); *Commonwealth v. Dinardo*, 2021 WL 1718071 at *2 (Pa. Super. April 30, 2021) (non-precedential decision) ("Subsection [9726](c) . . . does not apply to mandatory fines."); *Commonwealth v. Wright*, 2021 WL 1291629 at *3 (Pa. Super. April

[5] A sentencing "court shall not sentence a defendant to pay a fine unless it appears of record that . . . the defendant is or will be able to pay the fine . . . ." 42 Pa.C.S. § 9726(c)(1).

7, 2021) (non-precedential) ("[A] defendant's ability to pay is not a factor when fines and costs are mandatory.").

The Appellant also claims that Pennsylvania Rule of Criminal Procedure 706(C)[6] requires trial courts to conduct an inquiry into the ability to pay fines. However, "while a trial court has the discretion to hold an ability-to-pay hearing at sentencing, Rule 706(C) only requires the court to hold such a hearing **when a defendant faces incarceration** for failure to pay court costs previously imposed on him." *Commonwealth v. Snyder*, 251 A.3d 782, 798 (Pa. Super. 2021) (concerning costs) (*quoting Commonwealth v. Lopez*, 243 A.3d 589, 590 (Pa. Super. 2021) (*en banc*) (quotation marks omitted)); *see also Commonwealth v. Parler*, 2021 WL 1561565 at *4 (Pa. Super. April 21, 2021) (non-precedential decision) (Rule 706 only requires an ability-to-pay hearing when a court is committing a defendant to prison for failure to pay a fine or costs, and no such hearing is required at sentencing). Thus, Rule 706 does not require an ability to pay hearing for mandatory fines.

Mandatory fines are mandatory; for such fines, the General Assembly did not leave the trial court the discretion to excuse such fines if the defendant could not afford to pay the fines. The Appellant's legal argument is not novel; it has been considered and rejected by our appellate courts. There is no room for this Court to

[6] "The court in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means, including the defendant's ability to make restitution or reparations" Pa.R.Crim.P. 706(C).

overrule precedent or to defy the General Assembly's instructions that certain fines are mandatory. Under *Ford*, *supra*, the Appellant's argument is meritless.

Finally, neither the United States Constitution nor the Manga Carta require an ability to pay hearing when imposing a mandatory fine. *See* Appellant's Br., 32-42.

The Excessive Fines Clause and the Great Charter are implicated when a fine is so excessive that it "deprive[s] a wrongdoer of his livelihood." *Commonwealth v. 1997 Chevrolet and Contents Seized from Young*, 639 Pa. 239, 297, 160 A.3d 153 (2017) (*quoting U.S. v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028 (1998) (*citing* Magna Carta)) (quotation marks omitted). Unless the fine at issue would "deprive the property owner of his or her livelihood, i.e., his current or 'future ability to earn a living'", then the Excessive Fines Clause is not implicated. *1997 Chevrolet*, 639 Pa. at 297-98 (citations omitted); *see also Timbs v. Indiana*, --- U.S. ---, 139 S.Ct. 682, 688 (2019).

Here, the fine was not so extreme as to prevent the Appellant from earning a future living and thereby implicate the Excessive Fines Clause. The trial court imposed the smallest fine that it could permissibly impose. The Appellant's claim is meritless.

CONCLUSION

The Commonwealth respectfully requests that this Court affirm the judgment of sentence.

Respectfully submitted,

Date: September 24, 2021

/s/D. Daniel Woody
D. DANIEL WOODY
ID No. 309121
Assistant District Attorney

CERTIFICATION

Confidential Information and Confidential Documents

I certify that this filing complies with the provisions of the *Case Records Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

Date: September 24, 2021

/s/*D. Daniel Woody*
D. DANIEL WOODY
ID No. 309121
Assistant District Attorney

PROOF OF SERVICE

D. Daniel Woody, Assistant District Attorney, hereby certifies that on September 24, 2021, he served the following persons in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121.

Hand-Delivery:
Honorable G. Michael Green
Delaware County Courthouse
Media, Pennsylvania 19063

Steven M. Papi, Esquire
Assistant Chief, Appeals Division
Delaware County Office of the Public Defender
220 N. Jackson Street
Media, Pennsylvania 19063
(Counsel for Appellant)

/s/D. Daniel Woody
D. Daniel Woody
ID No. 309121
Assistant District Attorney
Delaware County District
Attorney's Office
Courthouse
Media, Pennsylvania 19063
610-891-3971
(Attorney for Commonwealth)