IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

MICHAEL A. FRANTZ,	:	
Petitioner	:	
	:	
v.	:	NO. 00-01,254
	:	
COMMONWEALTH OF PENNA.	:	
DEPARTMENT OF TRANSPORTATION,	:	
Defendant	:	

Opinion issued 29 September 2000

OPINION and ORDER

The question in this case is whether the Pennsylvania Department of Transportation may impose one license suspension for Driving Under the Influence by a Minor, and an additional suspension for Underage Drinking, when these charges arose out of the same occurrence. The court finds that only one suspension may be imposed because Underage Drinking is a lesser-included offense of Driving Under the Influence by a Minor.

Facts

The following relevant facts have been stipulated to by both parties. On 9 October 1999, Michael Frantz, a minor, was convicted of 18 Pa.C.S.A. § 6308, Underage Drinking, and also of 75 Pa.C.S.A. §3731, Driving Under the Influence by a Minor. Both charges were based on the same set of facts: Mr. Frantz was driving while he had a blood alcohol level of at least .02%. PennDOT imposed a one-year license suspension for each of these offenses.

Discussion

Mr. Frantz argues that PennDOT improperly imposed a double penalty for the same conduct because Underage Drinking is a lesser-included offense of Driving Under the Influence by a Minor. Under the doctrine of merger of related offenses, a court must determine whether the legislature intended for the punishment of one offense to encompass that for another offense arising out of the same criminal act or transaction. Zimmerman v. Department of Transportation, Bureau of Driver Licensing, 2000 WL 1345942 *2 (Pa. Commw.), issued September 20, 2000.[1] The relevant inquiry is whether one of the crimes is a lesser-included offense of the other. Id. A lesser-included offense is one in which all of its elements must be proven in order to establish the commission of another crime. Id., citing Commonwealth v. Anderson, 538 Pa. 574, 577, 650 A.2d 20, 21 (1994). Two crimes are distinct, however, if each has an element that is not required to prove the commission of the other. Id.

Turning to the two crimes before this court, the offense of Underage Drinking is defined at 18 Pa.C.S.A. § 6308:

> A person commits a summary offense if he, being less than 21 years of age, attempts to purchase, purchases, consumes, possesses or knowingly and intentionally transports any liquor or malt or brewed beverages, as defined in section 6310.6 (relating to definitions).

The offense of DUI by a Minor is defined at 75 Pa.C.S.A. § 3731(a)(4)(ii):

> A person shall not drive, operate or be in actual physical control of the

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[1] To his credit, counsel for PennDOT did not advance the argument that the merger doctrine does not apply to the imposition of civil sanctions. Admirably, he informed the defendant and the court of the very recent and highly controversial holding in Zimmerman, which rebuts that argument–at least until the Pennsylvania Supreme Court says otherwise.

movement of a vehicle in any of the following circumstances . . .

(4) While the amount of alcohol by weight in the blood of: . . .

(ii) a minor is 0.02% or greater.

Clearly, the elements of Underage Drinking are: (1) that the person is a minor, and (2) that the person attempts to purchase, purchases, consumes, possesses, or knowingly and intentionally transports any liquor or malt or brewed beverages. Both of these elements must also be proven in order to establish DUI of a Minor. Certainly the Commonwealth must prove the offender is a minor, and the only way in which a person can acquire a blood alcohol content of .02% is by consuming alcohol. Therefore, the Commonwealth must essentially prove that a person was guilty of Underage Drinking in order convict someone of DUI by a Minor.

Counsel for PennDOT attempted to escape this rather obvious conclusion by pointing out that a person need not have consumed alcohol to be guilty of 18 Pa.C.S.A. § 6308. That is certainly true, and therefore the above analysis would not apply in cases where a minor has not imbibed in a bibulous beverage, but has merely engaged in one of the enumerated illicit relationships with the forbidden firewater.

It matters not that the Underage Drinking statute provides alternative paths to conviction. In Anderson, supra, for instance, the court found that aggravated assault was a lesser-included offense of attempted murder. The statute set forth two ways to commit aggravated assault: by attempting to cause serious bodily injury or by actually causing it. The fact that the statute offered offenders two choices of conduct did not matter to the Anderson court, because in the case at hand the defendant had actually placed another

person in danger. In a footnote the court stated,

> Because any merger analysis must proceed on the basis of its facts, some aspects of the statutes will be relevant and others will not. In the case at bar, an actual injury was suffered, and so we are concerned with that subsection of the aggravated assault statute which concerns actual injury. We are not concerned with that subsection of the aggravated assault statute concerning attempted injury.

Id. at 582 fn. 3. Therefore, for purposes of the merger analysis in that case, the Supreme Court defined the relevant element of aggravated assault to be "infliction of serious bodily injury." Id. at 583.

Similarly, the Superior Court found reckless endangerment to be a lesser included offense of involuntary manslaughter, even though reckless endangerment could be committed by recklessly engaging in conduct that places another person in danger or engaging in conduct that *may* place another person in danger. Commonwealth v. Tipton, 396 Pa. Super. 402, 578 A.2d 964 (1990). The court considered the element to be "places" another in danger, because that is what the defendant had done.

The appellate courts are not concerned when criminal statutes contain a harmless "or," and neither are we. Not all minors who are convicted of 18 Pa.C.S.A. § 6308 will also be guilty of 75 Pa.C.S.A. § 3731(a)(4)(ii), but Mr. Frantz is, and that is all that matters. Therefore, PennDOT cannot impose a one-year suspension for each of the offenses.

This result makes sense when considering the purpose of the merger rule. When one is already being punished for certain conduct, it is unfair to punish him or her again for the very same conduct. Under the provisions of DUI by a Minor, the Commonwealth of Pennsylvania is entitled to one pound of Mr. Frantz' flesh for drinking at his tender

age–and few punishments could be more horrifying to a male under twenty-one than losing his driver's license for one year. PennDOT is not entitled to another pound of his flesh when the very same conduct resulted in an Underage Drinking conviction.

O R D E R

AND NOW, this _____ day of September, 2000, for the reasons stated in the foregoing opinion, Michael A. Frantz's appeal from the suspension imposed as a result of the underage drinking violation is granted, and that suspension is hereby set aside and the Pennsylvania Department of Transportation is ordered to remove the suspension from the petitioner's driving record.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell Jacques, Esq.
Hon. Clinton W. Smith
John Campana, Esq.
Francis Bach, Esq.
Office of Chief Counsel
1101 S. Front St., 3rd floor
Harrisburg, PA 17104-2516
Gary Weber, Esq.