

COMMONWEALTH v. HAGER, C.P. Franklin County Branch,
No. 164 of 1978

Criminal Law - Possession of Controlled Substance - Proof of Authority to Possess - 180 Day Rule

1. Before the Commonwealth must establish a defendant did not have authority to possess a controlled substance, the defendant must come forward with some credible evidence of authorization.
2. Upon presentation of credible evidence by defendant of authority to possess a controlled substance, the Commonwealth must prove lack of authorization beyond a reasonable doubt.
3. Where defendant's case was called for jury trial on 177th day after Complaint filed, and defendant waived jury trial, by making a request for a non-jury trial, knowing that the time for trial most likely would be set at the end of jury trials, the defendant gave the appearance of approval of the Court's scheduling beyond 180 days.

John F. Nelson, Esq., Assistant District Attorney, Counsel for the Commonwealth

Blake E. Martin, Esq., Public Defender, Counsel for the Defendant

OPINION AND ORDER

EPPINGER, P.J., September 14, 1979:

A bench warrant on another case had been issued for the defendant and he was stopped by a Greencastle policeman. When he was searched, two plastic bags containing marijuana seeds (more than a small quantity) were found on him. To the officer the defendant declared: "Man, you got me dead to right."

At the trial without a jury, the defendant did not contest he had the seeds. Relying on *Commonwealth v. Sojourner*, Pa. Super , A.2d (1978), though the Commonwealth introduced certificates of the commissioner of Professional and Occupational Affairs and of the Administrative Secretary of the Pennsylvania Drug, Device and Cosmetic Board that he had no authority to possess the drugs, the defendant contended the Commonwealth did not prove beyond a reasonable doubt that he was not licensed to possess the drugs. We felt at the trial that the proof offered by the Commonwealth together with the statement he made to the police officer was sufficient to establish his lack of authority. But that entire matter is academic now, because in an opinion filed June 22,

1979, after reargument, our Superior Court held that before the Commonwealth must establish defendant did not have authority to possess the marijuana, the defendant must come forward with some credible evidence of authorization. Then the government must negative this beyond a reasonable doubt. *Commonwealth v. Sojourner*, Pa. Super , A.2d (1979).

In this case, the defendant offered no proof at all of any authority to possess the marijuana, so the Commonwealth did more than it was required to do.

The date the defendant was tried was the 181st day after the complaint was filed. (Pa.R.Crim.P. 1100). On the 177th day his case was called for jury trial. the defendant waived jury trial and asked to be tried by a judge without a jury. When the defendant waived jury trial it was with the knowledge of his counsel that according to the established practice in the county, trials without a jury are set to begin upon the conclusion of the jury trials. This matter of court management and accommodation to the jury panel so that they do not have to remain on call while the court is involved in business other than jury trials. This is the best use of time of the jurors and the court. In this case, in accordance with this practice, the time set was the 181st day and neither defendant nor his counsel made any objection.

The defendant does not have a duty to bring himself to trial within 180 days. However, he waives his right to be tried within that time if he consents to the scheduling of a trial date beyond the Rule 1100 period. See *Commonwealth v. Connor*, Pa. Super , 392 A.2d 776 (10/20/78); *Commonwealth v. Hickson*, 235 Pa. Super 496, 344 A.2d 617 (1975). He waives his Rule 1100 rights if he "gave the appearance of approval to the Court's scheduling..." *Hickson*, supra. See also *Commonwealth v. Green*, 232 Pa. Super 134, 335 A.2d 493 (1975).

By making a request for a non-jury trial, knowing that the time for trial most likely would be set at the end of the first week scheduled for jury trials or at the beginning of the second week, depending on the number of jury trials listed, the defendant gave the appearance of approval of the court's scheduling beyond the time limits set in Rule 1100. When he made an application to dismiss with prejudice on the trial date, it was denied because of the foregoing principles.

These being the two points raised by the defendant in his post verdict motions, we find that neither is meritorious. Therefore, the motions will be denied.

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).