IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	)	**APPEAL NO. 98-020**
	)	**TRAFFIC CASE NO. 97-6830**
Plaintiff/Appellee,	)	
v.	)	**OPINION**
DANIEL MARTINEZ,	)	
Defendant/Appellant.	)	

Submitted on the briefs October 22, 1999
Cite as: *Commonwealth v. Martinez*, 2000 MP 5

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BEFORE: CASTRO, Associate Justice, BELLAS, Justice *Pro Tem*, WISEMAN, Special Judge.

CASTRO, Associate Justice:

[1,2]Daniel Martinez ("Defendant" or "Martinez") brings this appeal, claiming insufficient evidence to support his convictions of driving without a license, failure to yield the right of way, and driving under the influence of alcohol. We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands, as amended[1], and 1 CMC § 3102. We affirm in part and reverse in part.

ISSUES PRESENTED AND STANDARDS OF REVIEW

[1] N.M.I. Const. art. IV, § 3 was amended by the passage of Legislative Initiative 10-3, ratified by the voters on November 1, 1997 and certified by the Board of Elections on December 13, 1997.

The issues before this Court are:

> I. Whether the Prosecution proved beyond a reasonable doubt that Defendant violated 9 CMC § 2201, driving without a license;[2]
>
> II. Whether the Prosecution proved beyond a reasonable doubt that Defendant violated 9 CMC § 5351(d), failure to yield;
>
> III. Whether the Prosecution proved beyond a reasonable doubt that Defendant violated 9 CMC § 7105, driving under the influence of alcohol;

[3]A challenge to the sufficiency of evidence in a criminal case requires the Court to consider the evidence in the light most favorable to the government, and to determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Commonwealth v. Delos Reyes*, 4 N.M.I. 340, 344 (1996).

[4]Issues I and II also involve the question of whether Defendant received adequate notice of the charges against him, in violation of his due process rights. This is a question of law which we review *de novo*. *Commonwealth v. Campbell*, 4 N.M.I. 11, 15 (1993).

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning of August 5, 1997, Martinez, an off-duty police officer, was arrested and charged with five traffic violations while driving in Garapan. The violations included driving without a license, failure to yield the right-of-way, and driving under the influence of alcohol. Viewed in a light most favorable to supporting the conviction, the facts are as follows:

Three on-duty officers working at the Koban (police station) in Garapan first saw Martinez enter and exit several nightclubs at around midnight. Martinez was then seen driving west towards the Dai Ichi Hotel. Officer Aldan testified Martinez straddled lanes while driving, and was driving on the far left side of the road, as opposed to down the middle. Transcript of Trial Proceedings, Excerpts of Record ("E.R.") at 22-24, 61-62.

Martinez's driving was so erratic that he almost hit another driver. Officer Aldan testified he observed Martinez approaching a T-intersection. Martinez's vehicle was traveling up from the bottom of

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[2] Since we find Defendant did not receive adequate notice of the charges against him, we need not determine whether there was sufficient evidence to support the conviction.

the "T", towards the intersection. Another vehicle was signaling to turn left and go down the road on which Martinez was driving, in the opposite direction. Because Martinez's vehicle was so far out of the normal traffic lane, the other vehicle had to proceed farther into the intersection, past the point where a normal left turn should start, to avoid being hit by Martinez. E.R. at 24-25.

After the near-collision and a left turn, Martinez continued to drive in an erratic manner, at one point driving on top of the sidewalk and almost falling into a sewage pathway. When the car stopped in front of Friendship Karaoke, with the front right portion on the sidewalk, Officer Dela Cruz approached the vehicle and told Martinez his left rear tire had fallen into the ditch, and he had swerved while driving. Officers Aldan and David arrived soon after, and all three took Martinez to the Koban in a patrol car. The officers wanted to talk to Martinez and make sure he would get home safely. All three officers noticed a strong odor of alcohol on Martinez's breath. E.R. at 14-15, 97, 142.

While at the Koban, Martinez became argumentative and Officer David arrested him. The three officers took Martinez to DPS Central in Susupe for further processing. At DPS Central, Officer David tried to administer a Field Sobriety Test, but Martinez refused to cooperate. Instead of doing the balance test, Martinez did the moonwalk, walking backwards. E.R. at 32-34, 152-154, 157. Martinez also denied having a driver's license when asked for one. Finally, Martinez refused to take a breathalyzer test.

The trial court found the Government had proved its case beyond a reasonable doubt as to the charges of driving without a license, failure to yield, and driving under the influence of alcohol, but not as to the charge of reckless driving. In its Decision and Order, the court emphasized the strong odor of alcohol on Martinez's breath, the three officers' observations regarding Martinez's impaired balance and erratic driving, and Martinez's lack of cooperation. The trial court acknowledged the difficulty in having to cite a fellow officer, and reasoned that this was why the officers did not immediately arrest Martinez when he was stopped. The court observed that the decision to arrest Martinez came only after Martinez refused to cooperate with the officers and instead became argumentative, and not because they lacked sufficient probable cause.[3] *See Commonwealth v. Martinez*, Civ. No. 97-6830 (N.M.I. Super. Ct. Mar. 21, 1998) (Decision and Order). Martinez timely appealed the conviction.

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[3] We note that Officers Aldan, David, and Dela Cruz should not have deviated from their routine DUI and arrest procedures, nor should they have abandoned their duties solely because Martinez was a fellow officer.

ANALYSIS

I. Whether Defendant Was Properly Convicted under 9 CMC § 2201, Driving Without a License

[5,6]9 CMC § 2201 reads in pertinent part:

> (a) No person except those expressly exempted in this division may operate any motor vehicle upon a highway in the Commonwealth unless that person has been licensed as an operator under this Division.
>
> . . .
>
> (c) No person may operate any motor vehicle upon a highway in the Commonwealth without having on his person or in his immediate possession a valid license issued by the Bureau or a valid operator's license from outside the Commonwealth, provided there is compliance with 9 CMC § 2022.

9 CMC § 2201(a), (c).

Both Defendant and the Government present several arguments pertaining to Defendant's alleged violation of 9 CMC § 2201, subdivision (c), which the parties apparently believe was the subdivision at issue. However, the traffic citation only charges Defendant with violating § 2201; it does not specify a subdivision, although there are two different subdivisions which may have been violated. Subdivision (a) requires that a driver be licensed to drive. Subdivision (c) requires proof of such licensure in a driver's possession.

[7,8]In *United States v. Martin*, 783 F.2d 1449 (9th Cir. 1986), the court explained the importance of notice to a criminal defendant:

> Notice is ordinarily given by the language of the accusatory pleading. A charging document serves two purposes: (1) it enables the defendant to adequately prepare his defense and (2) it enables him to plead double jeopardy against a second prosecution. Charging documents are tested by whether they apprise the defendant of what evidence he must be prepared to meet.

Id. at 1453 (citations omitted), *rejected on other grounds in United States v. Schmuck*, 840 F.2d 384 (7th Cir. 1988). Thus, in the Ninth Circuit, a defendant may not be convicted of an offense different from that specifically charged by the grand jury. *United States v. Stewart Clinical Laboratory, Inc.*, 652 F.2d 804, 807 (9th Cir. 1981). The court may not amend the indictment by changing the offense charged to conform with the proof adduced at trial, nor may it substantially amend the indictment through its instructions to the jury.

[9]The government in *Stewart* argued defendants' convictions involved a mere variance between the facts alleged in the indictment and the evidence produced at trial, and that such discrepancy was not fatal to the conviction unless it was prejudicial to defendants' rights to notice of the charges against them and protection against double jeopardy. *Id*. The court rejected this argument, explaining that the case did not involve a simple clerical error or the elimination of surplusage from the text of an indictment. Instead, defendants were convicted of an offense that was not charged in the indictment in the first place, and amending the indictment to charge a new crime would constitute *per se* reversible error. *Id*.; *see State v. Meyers*, 709 P.2d 253, 254 (Or. Ct. App. 1985) (holding defendant cannot be convicted of crime not charged or necessarily included in indictment, even if evidence produced at trial would support conviction). This is because a defendant is entitled to notice of what conduct supports the government's claim against him. *United States v. Lipkis*, 770 F.2d 1447, 1453 (9th Cir. 1985).

[10]On the other hand, a conviction will not be reversed due to minor and technical deficiencies which do not prejudice the accused. *United States v. Martin*, 783 F.2d at 1452. Accordingly, where defendant in *Martin* was put on notice before trial that he was subject to conviction of a lesser included offense not specifically set forth in the information, but did not request an opportunity to present evidence regarding such offense, the court upheld the conviction. *Id*. at 1453.[4]

[11]In *United States v. Lipkis*, 770 F.2d 1447, defendant was charged with filing a false Medicare claim under 42 U.S.C. § 1395nn. The alleged facts suggested a violation of one subdivision; defendant, citing *Stewart*, argued his conduct could only have violated a different subdivision. The court found the distinction irrelevant, because the indictment was sufficient to adequately apprise defendant of the crime with which he was being charged. *Id.* at 1452. The court explained:

> A conviction may be sustained on the basis of a statute or regulation other than that cited [in the indictment] or even where none is cited at all, **as long as it is clear that the defendant was not prejudicially misled**. . . .

Id. at 1452 (citations omitted) (emphasis added). The court then distinguished *Stewart*:

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[4] In *Martin*, defendant was charged with assault resulting in serious bodily injury. The parties briefed the issue of which lesser included offenses were applicable to defendant. Defendant was convicted of the lesser included offense of assault with a deadly weapon with intent to do bodily harm. He then appealed, claiming lack of notice in the information that he would have to defend against the charge for which he was convicted.

> In *Stewart* the different crimes involved distinct conduct – bribery aimed at the referral of individuals on the one hand versus bribery aimed at the referral of lab work on the other. The *Stewart* defendants were entitled to notice of what conduct supported the government's indictment.
>
> In this case, Lipkis made a false statement on applications for [Medicare] payment. He was clearly given notice of the conduct that supported the government's indictment. We fail to see any appreciable difference in whether the "falseness" was accomplished by commission [under one subdivision] or omission [under another], and the difference, if any, did not prejudice Lipkis. The proof in either case is on the face of the documents in evidence and in the testimony of Lipkis' billing clerk and Lipkis himself.

Id. at 1453. Under these circumstances, the court found no variance between the charges and proof, no constructive amendment of the indictment, and no effect on defendant's substantial rights. *Id*.

[12]Here, the omission in the traffic citation[5] is critical. The evidence necessary to prove and defend against a conviction depends on whether Defendant was charged with being unlicensed generally under subdivision (a), or merely driving without proof of licensure under subdivision (c). It is of no consequence that the evidence presented at trial may have supported a conviction under one or both subdivisions,[6] because the traffic citation simply did not put Defendant on notice of the conduct for which he was charged and convicted, so that he could adequately defend himself. The conviction must therefore be reversed.

II. Whether Defendant Was Properly Convicted under 9 CMC § 5351(d), Failure to Yield

[13,14,15,16]A driver must yield the right of way as described below:

> (a) Except as otherwise provided in this division, when two vehicles are approaching or entering an intersection at approximately the same time, the operator of the vehicle on the left shall yield the right of way to the vehicle on the right. The operator of any vehicle approaching or entering any intersection at any unlawful rate of speed shall forfeit any right of way which he might otherwise have.
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> (b) The operator of a vehicle approaching but not having entered an intersection shall yield the right of way to a vehicle already within or turning in the intersection across the line of travel of the first-mentioned vehicle; provided, the operator of the vehicle turning across the line of travel has given a plainly visible signal of intention to turn.

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[5] A citation is the complaint or information used in traffic cases. Com. R. Traf. P. 3(a).

[6] There is no indication in the record that there was any evidence at trial suggesting Defendant was unlicensed in violation of subdivision (a).

> (c) The operator of a vehicle within an intersection, intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to be a hazard at any time during the turning movement and shall continue to yield the right of way to the approaching vehicles until such time as the left turn can be made with reasonable safety.
>
> (d) In all other situations not covered by subdivisions (a) through (c) of this section, the operator of any vehicle shall yield the right of way to any vehicle approaching from the right.

9 CMC § 5351.

[17]Martinez was charged with violating subdivision (d), a catch-all provision that includes all circumstances of failure to yield the right of way which are not addressed by subdivisions (a), (b) or (c). He argues he was charged with violating the wrong subdivision of the applicable section, because the circumstances of his driving were more appropriately described by the other subdivisions. The Government contends the applicable subdivision depends on the physical layout of the intersection, while Defendant argues that it is the timing of each vehicle's arrival at the intersection that determines the applicable subdivision. These arguments miss the mark. The relevant inquiry is whether Defendant received adequate notice of the charge against him. Here, as opposed to the driving without a license conviction, we find no error.

[18]Just as in *Lipkis*, in this case the distinction between subdivisions is inconsequential. The entire section deals with failure to yield the right of way. Each subdivision provides a different description of how a driver can fail to yield. However, it is clear that a charge under this section places a defendant on notice that he is being charged with failure to yield the right of way, regardless of the specific subdivision violated. Consequently, the same evidence is used to prove or defend against a conviction under any subdivision. In preparing a defense to the charge of violating subdivision (d), Martinez necessarily prepared a defense to subdivisions (a) through (c) because the issue was ultimately the same for each subdivision: whether Martinez failed to yield the right of way to another car. It matters little whether the other car was already in the intersection, or approaching it at the same time as Martinez, or whether the intersection was a T-stop or four-way stop. The fact remains that the Government had to prove Martinez proceeded where he should have yielded. As the Government satisfactorily proved that issue, the conviction must stand.

III. Whether the Prosecution Proved Beyond a Reasonable Doubt that Defendant Violated 9 CMC § 7105, Driving under the Influence of Alcohol.

Defendant claims there was insufficient evidence to support his conviction of driving while under the influence. Although there is some evidence suggesting Defendant was under the influence, he appears to be asking this Court to reweigh the evidence because it does not rise to a level beyond reasonable doubt. Defendant notes there is some discrepancy between the officers' testimony and their written police reports. The Government argues that, under the standard of review, there was sufficient evidence to support this conviction.

[19,20,21]No one may drive while under the influence of alcohol or other drugs. 9 CMC § 7105(a). The driver of a motor vehicle impliedly consents to a breath test for alcohol or drugs. 9 CMC § 7106(a). If the driver refuses to submit to a breath test, his license will be revoked for six months. 9 CMC § 7106(c).

[22]In *Commonwealth v. Delos Reyes*, 4 N.M.I. 340 (1996), the court found sufficient evidence to support a conviction of driving while under the influence of alcohol, where the arresting officer testified he observed the defendant's car speeding and swerving, where the defendant did not pull over immediately after the officer began pursuing him, and where the defendant smelled of alcohol, had bloodshot eyes and slurred speech, and failed two field sobriety tests. *Id.* at 344. Additionally, the defendant admitted to having consumed three cans of beer within ninety minutes of driving. *Id.*

While the facts of *Delos Reyes* are not identical to the facts of the case at bar, there are several notable similarities. All three officer witnesses testified they smelled alcohol on Martinez's breath. Two officers also noticed Defendant had bloodshot eyes, impaired coordination and slurred speech. Officer David noted Defendant's clothing was disorderly, and he was swaying as if off balance. Defendant lost his balance three times while walking down two different flights of stairs after exiting two different nightclubs, all within about an hour of driving the car. While driving, Defendant drove into a ditch by Remington Club, and drove up onto the sidewalk. One officer noticed Defendant's car was weaving left to right and at times driving on the far left side of the road.

[23]Defendant cites *People v. Roybal*, 655 P.2d 410 (Colo. 1982), *appeal after remand,* 672 P.2d 1003 (Colo. 1983) for the proposition that the odor of alcohol, by itself, does not establish probable

cause to arrest someone to determine blood alcohol content. The Government correctly notes that case is distinguishable from the facts at hand. At issue in *Roybal* was whether the police had probable cause to arrest the defendant after an automobile collision, where:

> The record [was] barren of evidence that the collision occurred as a result of misconduct by the defendant. All that we learn from the record is that an accident took place, the defendant was driving one of the cars involved, and he had an odor of alcoholic beverage about him.

Id. at 413. Thus, the odor of alcohol which the police officer noticed was the **only** evidence to suggest the defendant had been driving under the influence of alcohol. Here, in contrast, the odor of alcohol was not the only evidence presented at trial, as discussed above.

[24]As for any discrepancy between the officers' written and oral testimony, this is a credibility issue which we need not evaluate. *See Commonwealth v. Cabrera*, 4 N.M.I. 240, 246 n.30 (1995). The officers' testimony is sufficient evidence to support a reasonable trier of fact's finding that Defendant was under the influence of alcohol beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, we **REVERSE** the conviction for violation of 9 CMC § 2201, driving without a license, because Defendant did not receive adequate notice of the subdivision under which he was charged. As such, we need not address the issue of whether there was sufficient evidence to support his conviction. We **AFFIRM** the conviction under 9 CMC § 5351(d), failure to yield, because Defendant did receive adequate notice and the evidence was sufficient to support the conviction. As to the charge under 9 CMC § 7105, driving under the influence of alcohol, we find sufficient evidence to **AFFIRM** the conviction.

Dated this 23rd day of March, 2000.

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO, Associate Justice

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS, Justice *Pro Tem*

/s/ David A. Wiseman

DAVID A. WISEMAN, Special Judge