IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jose L. Vellon,	:	
Appellant	:	
	:	
v.	:	No. 117 C.D. 2020
	:	Submitted: September 11, 2020
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing	:	

BEFORE: HONORABLE P. KEVIN BROBSON, Judge[1]
HONORABLE ANNE E. COVEY, Judge
HONORABLE J. ANDREW CROMPTON, Judge

OPINION
BY JUDGE BROBSON **FILED: September 10, 2021**

Appellant Jose L. Vellon (Licensee) appeals from an order of the Court of Common Pleas of York County (trial court), which denied his statutory appeal of a one-year suspension of his operating privilege pursuant to Section 3804(e)(2)(i) of the Vehicle Code, 75 Pa. C.S. § 3804(e)(2)(i). We affirm.

I. BACKGROUND

On March 25, 2016, Licensee violated Section 3802(a)(1) of the Vehicle Code, 75 Pa. C.S. § 3802(a)(1), by committing the offense of driving under the influence of alcohol (DUI), an ungraded misdemeanor relating to general impairment (First DUI). (Reproduced Record (R.R.) at 105-11.) On November 22, 2016, Licensee was admitted into a twelve-month Accelerated Rehabilitative Disposition (ARD) program, during which time criminal proceedings

[1] This case was assigned to the opinion writer before January 4, 2021, when Judge Brobson became President Judge.

on the First DUI were postponed. (*Id*. at 1.) On December 23, 2016, approximately one month after Licensee began ARD, Licensee committed another DUI and was thereafter charged with an offense under Section 3802(c) of the Vehicle Code, relating to highest rate of alcohol (Second DUI). (*Id.* at 110.) Licensee's Second DUI violated the terms of his ARD, and, on June 22, 2017, he was removed from the ARD program. (*Id*. at 2-6.) Thereafter, Licensee pled guilty and was sentenced on both the First DUI and the Second DUI at the same hearing on October 19, 2017. (*Id*. at 7-16.)

As a civil collateral consequence of Licensee's DUI offenses, the Vehicle Code mandates that the Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (Department) impose a civil penalty in the form of an operating privilege suspension, the duration of which depends on the severity of the offense and whether the licensee has any prior offenses.[2] As a result, the Department suspended Licensee's operating privilege for a period of one year effective April 19, 2019, for his First DUI pursuant to Section 3804(e)(2)(i) of the Vehicle Code and for a period of eighteen months effective October 19, 2017, for his Second DUI pursuant to Section 3804(e)(2)(ii) of the Vehicle Code. (*Id.* at 19-21, 110.)

On November 29, 2017, Licensee filed a statutory appeal with the trial court, challenging the Department's one-year suspension of his operating privilege in connection with his First DUI.[3] (*Id.* at 22-25.) On March 1, 2018, the trial court

[2] *See Diveglia v. Dep't of Transp., Bureau of Driver Licensing*, 220 A.3d 1167, 1168-69 (Pa. Cmwlth. 2019).

[3] Licensee did not appeal the Department's eighteen-month suspension of his operating privilege under Section 3804(e)(2)(ii) of the Vehicle Code for his Second DUI offense and that suspension is not at issue in the present matter.

conducted a hearing to determine whether the Department's one-year suspension of Licensee's operating privilege was improper. (*Id*. at 26.) At the hearing, Licensee's counsel contended that, at the time that Licensee was sentenced for his First DUI, Licensee did not have a "prior offense" as defined in Section 3806 of the Vehicle Code, and Licensee, therefore, was subject to the exception to suspension set forth in Section 3804(e)(2)(iii) of the Vehicle Code and there was no basis for the Department to suspend Licensee's operating privilege. (*Id*. at 37-41; *see also id.* at 22-23.) The Department countered, *inter alia*, that under Section 3806(b)(3) of the Vehicle Code, a subsequent offense would—albeit counterintuitively—count as a prior offense for purposes of applying a penalty under Section 3804 of the Vehicle Code if, as in this case, the licensee is sentenced for two or more offenses on the same day. (*Id*. at 29-32, 36.) By order dated April 9, 2018, the trial court dismissed Licensee's appeal and reinstated Licensee's operating privilege suspension. (*Id*. at 119.)

Thereafter, on April 18, 2018, Licensee filed a motion for reconsideration (Motion), requesting that the trial court either schedule additional argument or sustain Licensee's appeal. (*Id.* at 120-36.) By order dated April 27, 2018, the trial court granted Licensee's Motion and, at least preliminarily, vacated its April 9, 2018 order dismissing Licensee's appeal, and directed the Department to file a comprehensive written response to Licensee's Motion. (*Id.* at 137-38.) Subsequent thereto, on April 4, 2019, the trial court heard argument on Licensee's Motion, at which time the parties continued to advance conflicting interpretations of the term "prior offense" as set forth in Section 3806 of the Vehicle Code. (*Id*. at 152-74.) Thereafter, by order dated December 30, 2019, the trial court denied Licensee's Motion and reinstated his operating privilege suspension. (R.R. at 185.) In its

accompanying opinion, the trial court concluded that, for purposes of determining whether to suspend a licensee's operating privilege or apply the exception under Section 3804(e) of the Vehicle Code, Section 3806(b)(3) of the Vehicle Code permits "two or more offenses sentenced on the same day to be considered prior offenses of each other." (*Id.* at 191-92.) The trial court explained that, had the General Assembly not intended this interpretation, "it would have stated that 'the offense for which defendant is sentenced *first* shall be a prior offense within the meaning of this subsection[,]' or words to similar effect." (*Id*. at 192 (emphasis added).) The trial court, therefore, essentially held that the Department did not err by concluding that Licensee's Second DUI was a prior offense of his First DUI or by issuing an operating privilege suspension under Section 3804(e)(2)(i) for Licensee's First DUI on that basis. (*Id*. at 191-93.) This appeal followed.

II. ARGUMENTS ON APPEAL

On appeal,[4] Licensee argues: (1) the trial court erred in concluding that the definition of "prior offense" set forth in Section 3806(a) of the Vehicle Code includes a conviction for which judgment of sentence has *not* been imposed before the sentencing on the present offense—*i.e.*, that Section 3806(b)(3) of the Vehicle Code somehow permits Licensee's Second DUI to be a prior offense of his First DUI such that the Department could suspend Licensee's operating privilege for one year under Section 3804(e) of the Vehicle Code; and (2) the Department does not have

[4] This Court's scope of review is "limited to determining whether the findings of fact are supported by competent evidence or whether the trial court committed an error of law or an abuse of discretion in reaching its decision." *Dep't of Transp., Bureau of Driver Licensing v. Grubb*, 618 A.2d 1152, 1153 n.3 (Pa. Cmwlth. 1992).

the authority to alter a sentencing court's calculation of the number of prior offenses as mandated by Section 3806(b)(2) of the Vehicle Code.[5]

III. DISCUSSION

A. Relevant Provisions of the Vehicle Code[6]

Before addressing the specifics of the parties' arguments, a review of the relevant provisions of the Vehicle Code is necessary and helpful. First, we consider the text of Section 3804(e) of the Vehicle Code, which governs "[s]uspension of operating privilege upon conviction," and provides, in pertinent part:

> (1) The [D]epartment shall suspend the operating privilege of an individual under paragraph (2) upon receiving a certified record of the individual's conviction of or an adjudication of delinquency for:
>
> (i) an offense under [S]ection 3802 [of the Vehicle Code]; or
>
> (ii) an offense which is substantially similar to an offense enumerated in [S]ection 3802 [of the Vehicle Code] reported to the [D]epartment under Article III of the compact in [S]ection 1581 [of the Vehicle Code] (relating to Driver's License Compact).
>
> (2) Suspension under paragraph (1) shall be in accordance with the following:
>
> (i) *Except as provided for in subparagraph (iii), [twelve] months for an ungraded misdemeanor* or misdemeanor of the second degree under this chapter.
>
> (ii) [Eighteen] months for a misdemeanor of the first degree or felony of the third degree under this chapter.

---

[5] The trial court did not specifically address the question of whether the Department has the authority to independently assess whether a licensee has a prior offense and to thereafter issue an operating privilege suspension on that basis in the opinion accompanying its order denying Licensee's Motion. Licensee, however, made this argument before the trial court and the issue was, therefore, preserved for the purposes of the present appeal. (R.R. at 44-45, 53); *see also* Pa. R.A.P. 302.

[6] 75 Pa. C.S. §§ 101-9805.

> (iii) *There shall be no suspension for an ungraded misdemeanor under [S]ection 3802(a) [of the Vehicle Code] where the person is subject to the penalties provided in subsection (a) and the person has no prior offense.*

(Emphasis added.) Accordingly, to qualify for the exception to the operating privilege suspension set forth in Section 3804(e)(2)(iii), an individual must: (1) be convicted for an ungraded misdemeanor under Section 3802(a); (2) be subject to the penalties in Section 3804(a) (relating to first-time DUI offenses); and (3) have no *prior offense*. *See Diveglia*, 220 A.3d at 1170. In the present case, the parties do not dispute that Licensee satisfies the first two conditions. Whether Licensee meets the requirements of the exception set forth in Section 3804(e)(2)(iii), therefore, hinges on whether he has a prior offense as that term is defined in Section 3806 of the Vehicle Code.[7]

Section 3806 of the Vehicle Code provides:

> (a) General rule.--*Except as set forth in subsection (b)*, the term "prior offense" *as used in this chapter* shall mean *any conviction for which judgment of sentence has been imposed*, adjudication of delinquency, juvenile consent decree, acceptance of [ARD] or other form of preliminary disposition before the sentencing on the present violation for any of the following:
>
> > (1) an offense under [S]ection 3802 [of the Vehicle Code] (relating to driving under influence of alcohol or controlled substance);

[7] Recently, in *Commonwealth v. Chichkin*, 232 A.3d 959 (Pa. Super. 2020), the Pennsylvania Superior Court concluded that Section 3806 of the Vehicle Code is unconstitutional insofar as it considers acceptance of ARD a "prior offense" and permits a trial court to increase an individual's criminal sentence based solely upon that individual's prior acceptance of ARD. *Chichkin*, 232 A.3d at 971. In review of the opinion, we believe that the Superior Court focused its determination of unconstitutionality strictly on the language that defines acceptance of ARD in a DUI case as a prior offense and not the entire statutory provision. As this case does not concern any attempt to consider Licensee's acceptance of ARD as a prior offense, we do not hesitate to analyze and enforce the remainder of Section 3806.

> (2) an offense under former [S]ection 3731 [of the Vehicle Code];
>
> (3) an offense substantially similar to an offense under paragraph (1) or (2) in another jurisdiction; or
>
> (4) any combination of the offenses set forth in paragraph (1), (2) or (3).
>
> (b) Timing.--
>
> (1) For purposes of [S]ections 1553(d.2) (relating to occupational limited license), 1556 (relating to ignition interlock limited license), 3803 (relating to grading), *3804 (relating to penalties)* and 3805 (relating to ignition interlock) [of the Vehicle Code], the prior offense must have occurred:
>
> (i) within 10 years prior to the date of the offense for which the defendant is being sentenced; or
>
> (ii) on or after the date of the offense for which the defendant is being sentenced.
>
> (2) *The court shall calculate the number of prior offenses, if any, at the time of sentencing*.
>
> (3) *If the defendant is sentenced for two or more offenses in the same day, the offenses shall be considered prior offenses within the meaning of this subsection.*

(Emphasis added.) Relevant here is the time limitation imposed by Section 3806(b)(3), which addresses the situation in which an individual, like Licensee, is sentenced for two offenses on the same day.

B. Section 3806(b)(3) of the Vehicle Code Prior Offense – Sentenced for Two Offenses on Same Day

Licensee argues that the trial court erred by dismissing his appeal from the Department's one-year suspension of his operating privilege for his First DUI, because the judgment of sentence for his Second DUI was not imposed before sentencing on his First DUI and, therefore, his Second DUI does not constitute a "prior offense" under Section 3806 of the Vehicle Code. Licensee's argument in this regard can essentially be broken down into two parts. First, Licensee contends

that the definition of "prior offense" set forth in Section 3806(a)—*i.e.*, "any conviction for which judgment of sentence has been imposed"—is the definition that applies to the entirety of Section 3806, including all of Section 3806(b). Licensee, therefore, claims that the exclusionary language in Section 3806(a)—*i.e.*, "except as set forth in subsection (b)"—does not create an entirely new definition of "prior offense" in Section 3806(b); rather, it narrows the applicability of a "prior offense" in Section 3806(a) to the *time constraints* set forth in Section 3806(b), as suggested by Section 3806(b)'s heading "Timing." As a result, Licensee argues that Section 3806(b)(3) cannot defy the definition of "prior offense" as set forth in Section 3806(a) to permit a finding that Licensee's Second DUI is a prior offense of his First DUI. Second, as it concerns the correct interpretation of Section 3806(b)(3), Licensee argues that Section 3806(b)(3) simply applies the rules in Section 3806(b)(1)(i) (relating to offenses within the last 10 years) and (ii) (relating to convictions on or after the date of the offense being sentenced) to a situation where an individual is convicted of two offenses on the same day, as evidenced by the General Assembly's use of the language "within the meaning of this subsection." In sum, Licensee contends that the language set forth in Section 3806(b)(3) is clear: "[a] prior offense must be a prior offense *within the meaning of this subsection*[—]*i.e.*, the disposition of the previous offense must have occurred before sentencing on the current offense"—and at the time that Licensee was sentenced for his First DUI, no judgment of sentence had been imposed for his Second DUI. (Licensee's Br. at 26-27 (emphasis in original).)

In response, the Department argues that the trial court properly concluded that Licensee's Second DUI was a prior offense of his First DUI, because Licensee was sentenced for his Second DUI on the same day that he was sentenced for his First

DUI. The thrust of the Department's argument is that Section 3806(b)(3) of the Vehicle Code creates an exception to Section 3806(a), not, as Licensee suggests, to Section 3806(b)(1), whereby two offenses sentenced on the same day can be considered prior offenses of each other. The Department suggests that the General Assembly intended to exempt Section 3806(b) from the definition of "prior offense" in Section 3806(a), as evidenced by the exclusionary language in Section 3806(a) "except as set forth in subsection (b)," thereby allowing Section 3806(b)(3) to operate independently of Section 3806(a). Thus, the Department contends that, when Section 3806(a) is construed together with Section 3806(b)(3), "it is clear that the General Assembly intend[ed] that where [a] licensee's sentencing occurs on the same day for more than one violation . . . , the order in which the sentencing occurs (*i.e.*, the 'timing' of the convictions) does not matter because 'the offenses shall be considered prior offenses within the meaning of this subsection.'" (Department's Br. at 13-14 (footnote omitted) (quoting Section 3806(b)(3) of the Vehicle Code).) Hence, by the Department's reading of Section 3806 of the Vehicle Code, Licensee's Second DUI is a prior offense of his First DUI, because both sentences occurred on the same day, and Licensee, therefore, is not eligible for the exception to the one-year operating privilege suspension contained in Section 3804(e)(2)(iii) of the Vehicle Code.

The question of whether Licensee's Second DUI can be considered a prior offense of his First DUI is one of pure law and, more specifically, statutory interpretation. As such, our review is plenary, and we owe no deference to the legal conclusions of the trial court. *Siekierda v. Dep't of Transp., Bureau of Driver Licensing*, 860 A.2d 76, 81 (Pa. 2004). When interpreting a statute, this Court is guided by the Statutory Construction Act of 1972 (Statutory Construction Act), 1 Pa.

C.S. §§ 1501-1991, which provides that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a). "The clearest indication of legislative intent is generally the plain language of a statute." *Walker v. Eleby*, 842 A.2d 389, 400 (Pa. 2004). "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b). Only "[w]hen the words of the statute are not explicit" may this Court resort to statutory construction. 1 Pa. C.S. § 1921(c). "A statute is ambiguous or unclear if its language is subject to two or more reasonable interpretations." *Bethenergy Mines Inc. v. Dep't of Env't Prot.*, 676 A.2d 711, 715 (Pa. Cmwlth.), *appeal denied*, 685 A.2d 547 (Pa. 1996). Moreover, "[e]very statute shall be construed, if possible, to give effect to all its provisions." 1 Pa. C.S. § 1921(a). It is presumed "[t]hat the General Assembly intends the entire statute to be effective and certain." 1 Pa. C.S. § 1922(2). Thus, no provision of a statute shall be "reduced to mere surplusage." *Walker*, 842 A.2d at 400 (citing 1 Pa. C.S. § 1921(a)). Finally, it is presumed "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa. C.S. § 1922(1).

Licensee first asserts that the definition of "prior offense" in Section 3806(a) of the Vehicle Code applies to Section 3806(b)(3) such that it does not permit a finding that Licensee's Second DUI is a prior offense of his First DUI. Licensee argues that, contrary to the Department's argument, the exclusionary language in Section 3806(a)—*i.e.*, "except as set forth in subsection (b)"—does not exempt Section 3806(b)(3) from the definition of "prior offense" in Section 3806(a). In support of his argument, Licensee primarily relies on the Pennsylvania Supreme

Court's decision in *Commonwealth v. Mock*, 219 A.3d 1155 (Pa. 2019), and this Court's decision in *Diveglia*.

In *Mock*, the Supreme Court considered whether the timeline for the ten-year lookback provision under Section 3806(b)(1)(i) of the Vehicle Code begins running at the occurrence date or the conviction date of a prior offense. *Mock*, 219 A.3d at 1156. The appellant there argued that the occurrence date controlled, in part, because the language in Section 3806(a) of the Vehicle Code ("any *conviction*") did not apply to Section 3806(b)(1)(i) because of Section 3806(a)'s exclusionary language—*i.e.*, "[e]xcept as set forth in subsection (b)." *Id.* at 1158-59. In holding that the conviction date is the proper marker for running the clock on a prior offense, the Supreme Court concluded that the exclusionary language in Section 3806(a) does not modify the essential definition of prior offense as applied to Section 3806(b). *Id.* at 1160-61. Rather, Section 3806(b) simply applies time limits to the broad definition of "prior offense" in Section 3806(a)—*i.e.*, "*any* conviction" becomes "*a* conviction" within the enumerated time constraints. *Id.*

In *Diveglia*, a licensee was arrested for first and second DUI violations roughly seven months apart, but the sentencing for the second DUI violation occurred several months *before* sentencing on the first DUI violation. *Diveglia*, 220 A.3d at 1168. After receiving the conviction record for the second DUI, the Department suspended the licensee's operating privilege for eighteen months pursuant to Section 3804(e)(2)(ii) of the Vehicle Code. *Id.* at 1168-69. Around seven months later, when the Department received the conviction record for the licensee's first DUI, the Department concluded that the conviction for the second DUI constituted a prior offense pursuant to Section 3806 of the Vehicle Code, and

the Department suspended the licensee's operating privilege for twelve months pursuant to Section 3804(e)(2)(i). *Id.* at 1169. On appeal to this Court, we considered whether the second DUI could be a prior offense of the first DUI simply because the licensee received the conviction for the second DUI prior to the conviction on the first DUI. *Id*. In holding that the second DUI was a prior offense, we emphasized that the plain language of Section 3806 considers any conviction for which judgment of sentence *has been imposed* to be a prior offense, regardless of the date of occurrence of the violation itself. *Id.* at 1171-72. We noted, however, that Section 3806(b) further requires that we consider whether the conviction falls within the enumerated time constraints. *Id*. Because the second DUI conviction occurred within the ten years prior to the conviction for the first DUI, it satisfied Section 3806(b)(1)(i) of the Vehicle Code, and the conviction constituted a prior offense. *Id*.

Licensee argues that *Mock* and *Diveglia* unequivocally establish that the definition of "prior offense" as set forth in Section 3806(a) of the Vehicle Code applies to Section 3806(b) of the Vehicle Code, and that Section 3806(a)'s exclusionary language does not permit Section 3806(b)(3) to operate independently of the general definition of "prior offense." We agree. The Supreme Court's decision in *Mock* clearly sets forth that there is one definition of "prior offense" in Section 3806(a), and that the exclusionary language in Section 3806(a) simply indicates that Section 3806(b) applies time limits that narrow the application of Section 3806(a)—*i.e.*, Section 3806(b) changes *any* conviction for which judgment of sentence has been imposed to *a* conviction for which judgment of sentence has been imposed that occurs (1) within ten years prior to the date of the offense for which the licensee is being sentenced, or (2) on or after the date of the

offense for which the licensee is being sentenced. Similarly, this Court's decision in *Diveglia* established that the rules in Section 3806(b) apply in conjunction with the definition of "prior offense" in Section 3806(a) and not in exception to it. Accordingly, contrary to the Department's argument, the foregoing makes clear that Section 3806(b)(3) does not operate independently from the general definition of "prior offense" in Section 3806(a).

Our analysis cannot end there, however, as neither *Mock* nor *Diveglia* is dispositive as to the correct operation of Section 3806(b)(3) of the Vehicle Code. Rather, *Mock* and *Diveglia* concerned the application of the definition of "prior offense" in Section 3806(a) of the Vehicle Code to Section 3806(b)(1), *not* Section 3806(b)(3). Thus, while we agree with Licensee that there is one definition of "prior offense" in Section 3806(a) and that the exclusionary language in Section 3806(a) does not allow Section 3806(b) to contravene that definition, we must still determine how Section 3806(b)(3) operates and whether it applies to Licensee's circumstances. Licensee asserts that Section 3806(b)(3) strictly modifies Section 3806(b)(1)(i)-(ii) to apply the ten-year lookback provision and the on-or-after-the-date rules to a circumstance where an individual is sentenced to two or more offenses on the same day. Licensee insists that the language "within the meaning of this subsection" in Section 3806(b)(3) couches its operation only to Section 3806(b)(1)(i)-(ii). Thus, according to Licensee, Section 3806(b)(3) does not permit a finding that his Second DUI is a prior offense of his First DUI. Licensee's interpretation, however, would render Section 3806(b)(3) meaningless. There is nothing in Section 3806(b)(1)(i)-(ii) or elsewhere in Section 3806 to suggest that, absent the language in Section 3806(b)(3), the rules in Section 3806(b)(1)(i)-(ii) would *not* apply to two or more offenses sentenced on the same day. Rather, it is

plain from the text of Section 3806(b)(1)(i)-(ii) that they would. Licensee's interpretation would, therefore, cause Section 3806(b)(3) to have no effect. As noted above, in construing a statute, we must, where possible, "give effect to all its provisions" and avoid reducing a provision to mere surplusage. 1 Pa. C.S. § 1921(a); *Walker*, 842 A.2d at 400. Accordingly, we disagree with Licensee's interpretation that Section 3806(b)(3) simply applies the rules in Section 3806(b)(1)(i)-(ii) to a circumstance where an individual is sentenced to two or more offenses in one day.

Instead, we interpret Section 3806(b)(3) of the Vehicle Code as contemplating the possibility that when two or more offenses are sentenced on the same day none would be a prior offense of the others. Section 3806(b)(3), therefore, remedies this issue by providing that "the offenses shall be considered prior offenses within the meaning of this subsection." Thus, rather than defying the general definition of "prior offense" in Section 3806(a) by reordering a first and second conviction in time, as Licensee claims such an interpretation would, Section 3806(b)(3) simply indicates that two or more offenses sentenced on the same day have no ordering in time that precedes the other. In other words, in order to prevent a licensee from having no prior offense when that licensee is sentenced for multiple offenses on the same day, Section 3806(b)(3) causes the offenses to be prior offenses. In addition, contrary to Licensee's contentions, the language "within the meaning of this subsection" merely indicates that the "prior offenses" are within the contours of Section 3806(b) concerning *timing* and not that Section 3806(b)(3) strictly modifies Section 3806(b)(1). Accordingly, we cannot conclude that the trial court erred by determining that Licensee's Second DUI was a prior offense of his First DUI.

C. Section 3806(b)(2) of the Vehicle Code Calculation of the Number of Prior Offenses

Licensee contends that the Department exceeded its statutory authority when it determined that Licensee's Second DUI was a prior offense of his First DUI. Licensee submits that Section 3806(b)(2) of the Vehicle Code confers *exclusive* authority on the sentencing court to calculate prior offenses at the time of sentencing, and the Department, thus, is not authorized to thereafter modify that calculation. Because the sentencing court did not conclude that he had any prior offenses, Licensee claims that the Department was not authorized to subsequently determine that Licensee had a prior offense and to assess an operating privilege suspension based upon that determination.

The Department responds that, while the sentencing court is required to calculate the number of prior offenses at the time of sentencing in accordance with Section 3806(b)(2) of the Vehicle Code, the sentencing court's calculation is not *binding* on the Department when it considers whether to impose an operating privilege suspension as a collateral civil consequence. The Department points out that Section 3804(e)(1) of the Vehicle Code, which provides that "[t]he [D]epartment *shall suspend* the operating privilege of an individual . . . upon receiving a certified record of the individual's conviction," empowers the Department to impose an operating privilege suspension. (Emphasis added.) The Department contends that Section 3804(e)(1) must be read *in pari materia* with Section 3806, thereby evidencing the Department's authority to calculate prior offenses. The Department further cites to two additional provisions in support of its argument: (1) Section 1531 of the Vehicle Code, 75 Pa. C.S. § 1531, which provides that "[t]he [D]epartment shall administer an integrated system limited to the authority granted to the [D]epartment . . . for revocation and suspension of operating

privileges," and (2) Section 1516(a)(3) of the Vehicle Code, 75 Pa. C.S. § 1516(a)(3), which provides that "[t]he [D]epartment shall maintain suitable records containing . . . [t]he name of every licensee whose license has been suspended or revoked by the [D]epartment and the reasons for such action." These provisions, the Department argues, demonstrate that it "has a statutory duty to administer the provisions of the Vehicle Code requiring revocation or suspension of operating privileges *and* to maintain driving records that accurately reflect a person's operating privilege suspensions and revocations and the reasons therefor." (Department's Br. at 19 (emphasis in original).) For all these reasons, the Department contends that the General Assembly directed the Department—not the criminal sentencing court—to calculate prior offenses pursuant to Section 3806 for the purpose of imposing the civil penalties under Section 3804(e).

Section 3806(b)(2) of the Vehicle Code provides that "[t]he court shall calculate the number of prior offenses, if any, at the time of sentencing." While we agree with Licensee that this language directs the sentencing court, not the Department, to calculate any prior offenses, we cannot ignore the fact that the criminal and civil contexts differ meaningfully as it concerns penalties. We previously emphasized this division in *Diveglia*. As noted above, in *Diveglia*, a licensee was arrested for first and second DUI violations roughly seven months apart, but the sentence for the second DUI violation occurred several months *before* sentencing on the first DUI violation. *Diveglia*, 220 A.3d at 1168. The licensee argued that the second DUI violation was *not* a prior offense of the first DUI violation, in part, because the sentencing court did not treat it as such—*i.e.*, the sentencing court actually considered the first DUI violation a prior offense of the second DUI violation. *Id.* at 1172-73. In rejecting this argument, this Court held

that a sentencing court's characterization of a DUI for the purpose of imposing *criminal* penalties is entirely irrelevant for establishing, pursuant to Section 3806 of the Vehicle Code, whether an individual has a prior offense, and/or for imposing a *civil* penalty under Section 3804(e) of the Vehicle Code based upon that finding.[8] *Id*. *Diveglia*, therefore, instructs that a sentencing court's calculation of prior offenses for the purpose of criminal sentencing is not binding as it concerns Section 3806 of the Vehicle Code and the imposition of civil penalties under Section 3804(e) of the Vehicle Code. Section 3804(e)(1) further provides that the Department *shall suspend* an individual's operating privilege upon receiving a certified record of the individual's conviction. This provision, when read in conjunction with the direction of *Diveglia*, clearly indicates that the Department is empowered to establish whether an individual has a prior offense and to issue an operating privilege suspension on that basis. Accordingly, we cannot conclude that the Department exceeded its statutory authority by determining that Licensee's

---

[8] We further noted in *Diveglia* that,

> for purposes of imposing criminal sentences for violations of various subsections of Section 3802 of the Vehicle Code, Section 3804 of the Vehicle Code takes into consideration whether the offense for which the person is being charged is a "first," "second," "third," "fourth," or "subsequent offense" and imposes increasingly harsher sentences on licensees who have had more offenses. Those sentencing subsections do not reference the concept of "prior offenses." Rather, the only reference in Section 3804 of the Vehicle Code to the term "prior offense" is found in [Section 3804](e)(2)(iii), which provides a narrowly tailored exception from suspension where a licensee has "an ungraded misdemeanor under Section 3802(a) [of the Vehicle Code]"—which is the lowest of the prohibited impairment levels—and "the person is subject to the penalties provided in subsection (a) and . . . has no prior offense."

Diveglia, 220 A.3d at 1173 (footnote omitted) (citations omitted). A sentencing court, therefore, would have no reason to consider whether an individual has a "prior offense" under Section 3806 of the Vehicle Code when sentencing an offender to the criminal penalties in Section 3804 of the Vehicle Code.

Second DUI was a prior offense of his First DUI or by using that determination to thereafter issue a one-year operating privilege suspension to Licensee under Section 3804(e)(2)(i) of the Vehicle Code.

IV. CONCLUSION

For the foregoing reasons, we affirm the trial court's order.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jose L. Vellon, Appellant	:	
v.	:	No. 117 C.D. 2020
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing	:	

O R D E R

AND NOW, this 10th day of September, 2021, the order of the Court of Common Pleas of York County, denying the statutory appeal of a one-year suspension of the operating privilege of Jose L. Vellon pursuant to Section 3804(e)(2)(i) of the Vehicle Code, 75 Pa. C.S. § 3804(e)(2)(i), is AFFIRMED.

P. KEVIN BROBSON, Judge