

**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

CHRISTOPHER B. LUNDIN)	
)	
Petitioner Below/Appellant,)	
)	
v.)	Civil Action No: 2008-01-090
)	
)	
JENNIFER K. COHAN, DIRECTOR,)	
DIVISION OF MOTOR VEHICLES,)	
)	
Defendant Below/Appellee.)	

**Submitted: January 6, 2009
Decided: January 28, 2009**

Louis B. Ferrara, Esquire
Ferrara & Haley
1716 West Street
P.O. Box 188
Wilmington, DE 19899
Attorney for Appellant

Frederick H. Schranck, Esquire
Deputy Attorney General
Department of Justice
P.O. Box 778
Dover, DE 19903
Attorney for Appellee

APPEAL FROM DIVISION OF MOTOR VEHICLES - AFFIRMED

Christopher B. Lundin, petitioner-below/appellant (hereinafter “Lundin”) brings this appeal from a decision of the Division of Motor Vehicles (hereinafter “DMV”), dated December 26, 2007 revoking his license for failure to submit to a chemical test, pursuant to 21 *Del.C.* § 2742(b)(1). The hearing officer concluded that Lundin refused to submit to an intoxilyzer test after being informed of the penalty of revocation for such refusal, following a hearing which was held on November 6, 2007.

FACTS

On the night of July 14, 2007, Corporal Nicholas Sansone (hereinafter “Officer Sansone”) of the Newark Police Department was working a sobriety checkpoint in the 500 block of Paper Mill Road, Newark, Delaware. Officer Sansone was directed by his commanding officer to position his vehicle at the intersection of Paper Mill Road and Winterthur Lane to observe any vehicle which may attempt to avoid the checkpoint. At approximately 11:50 p.m., Officer Sansone observed a silver Porsche 911 traveling southbound towards the roadblock. The vehicle slowed down, pulled to the side of the road approximately ten (10) feet past the intersection, and stopped briefly. The vehicle then made a U-turn from the shoulder, across the southbound lane, across a double yellow line, and into the northbound lane.¹ Officer Sansone pursued the vehicle, activated his emergency lights, and pulled it over and Lundin was the driver.

Lundin stated to Officer Sansone he made the U-turn because he did not think he could travel farther down the road, believing there was an accident. Officer Sansone testified at the hearing that while speaking with Lundin, he detected a strong odor of alcohol emanating from the vehicle, Lundin’s eyes were glassy and bloodshot, and his speech was slurred. Officer Sansone asked Lundin whether he had consumed any alcoholic beverages. Lundin responded that he had had a couple of drinks a few

¹ Officer Sansone testified at the hearing that the U-turn was illegal under 21 Del. C. §4124 and Newark Municipal Code, §20-73

hours ago at happy hour. At that point, Officer Sansone asked Lundin if he would step out of the vehicle and submit to field sobriety tests, which Lundin agreed. Officer Sansone administered the horizontal gaze nystagmus (HGN) test, walk-and-turn test, and one-leg stand test. Lundin failed all three tests. At 12:06 a.m., Lundin administered a Preliminary Breath Test (PBT), which Lundin also failed.

Based upon Lundin's performance on the field coordination test and the results of the PBT test, Officer Sansone placed him under arrest for Driving Under the Influence of Alcohol (DUI). Lundin was transported to the Newark Police station for processing. After arrival, Officer Sansone testified he began a twenty-five minute observation period at 0015 hour, prior to administering the intoxilyzer test at 12:40 a.m. At 12:40 a.m., after observing Lundin for the required period where Officer Sansone testified, Lundin did not burp, regurgitate, eat, smoke or drink, he attempted to administer the Intoxilyzer 5000 breath test.

At that point, Lundin advised that he would not take any more tests. Officer Sansone testified he asked Lundin several more times if he would submit to the test, but he refused. Officer Sansone testified he then read him the implied consent provision and asked Lundin if he understood what was read. Lundin replied he did not understand. Officer Sansone testified he read the paragraph to Lundin a second time and Lundin stated again he did not understand. Officer Sansone testified he then handed Lundin the implied consent form for him to read, advising he should take all the time he needed. However, Lundin refused to read the form. Officer Sansone testified when he asked him why he refused to take the intoxilyzer test,

Lundin responded that he did not understand his rights and had not yet spoken with his attorney. He was then asked to sign the implied consent form, which he also refused. Lundin was then issued summons for Driving While Under the Influence of Alcohol and making an illegal U-turn.

On December 11, 2007, Lundin appeared at DMV for a hearing pursuant to *21 Del. C. §2742*. At the hearing, Sansone entered a copy of the implied consent paragraph he read to Lundin into evidence, as well as his report. (Transcript, Page A017) Respondent's counsel did not object to the submissions. On December 26, 2007, the hearing officer held Officer Sansone had probable cause to take Lundin into custody and require that he submit to the intoxilyzer test. He further revoked Lundin's license for 12 months for refusing to submit to a chemical test in violation of *21 Del. C. §2742(b)(1)*.

STANDARD OF REVIEW

The standard of review of an appeal from an administrative decision of the DMV is on the record, and, as such, is limited to correcting errors of law and determining whether substantial evidence exists to support the hearing officer's factual findings and conclusions of law.² Therefore, the decision will stand unless the Court finds the hearing officer's findings are not supported by substantial evidence in the record or are "not the product of an orderly and logical deductive process."³

² *Shahan v. Landing*, 632 A.2d 1357 (Del 1994).

³ *Quaker Hill Place v. State Human Relations*, 498 A.2d 175 (Del Super. 1985)

OPINION

In this appeal, Lundin contends there was no competent evidence submitted at the DMV hearing showing that: (1) Officer Sansone had probable cause to believe Lundin was driving in violation of an offense substantially conforming to *21 Del. C. §4177*; (2) that by a preponderance of the evidence Lundin was driving in violation of an offense substantially confirming to *21 Del. C. §4177*; (3) that DMV erred as a matter of fact and law when it concluded there was probably cause to believe Lundin was driving a motor vehicle under the influence of alcohol; and (4) that DMV erred as a matter of law in determining that based upon the preponderance of the evidence, it appeared that Lundin was driving a motor vehicle while under the influence of alcohol.

While Lundin alleges four (4) bases in his appeal, he only advances one position in his supporting brief. He argues Officer Sansone's failure at the DMV hearing to read the implied consent form into the record is fatal to the Officer's proof that Lundin refused to take the intoxilyzer test after he had properly been informed of the penalty for such refusal. Because Lundin does not offer support for the other allegations set forth in his notice of appeal, the Court treats those positions as abandoned. The Court therefore only addresses the argument asserted by Lundin in his written submission.

The provisions of *21 Del.C. § 2740* provide that:

Any person who drives, operates or has in actual physical control a vehicle, an off-highway vehicle, a moped or a bicycle within this State shall be deemed to have given his consent, subject to this section and §

4177 of this title to a chemical test or tests of his blood, breath and/or urine for the purpose of determining the presence of alcohol or a drug or drugs. The testing may be required of a person when an officer has probable cause to believe the person was driving, operating or in physical control of a vehicle in violation of § 4177 or 2742 of this title, or a local ordinance substantially conforming thereto.⁴

Further, the provisions of *21 Del.C. § 2742(a)* and (b), provide in relevant part:

(a) If a person refuses to permit chemical testing, after being informed of the penalty of revocation for such refusal, the test shall not be given but the police officer shall report the refusal to the Department . . .

(b) Upon certification by the police officer that there existed probable cause to believe that the person had been acting in violation of § 4177 of this title or a local ordinance substantially conforming thereto and that the person refused to submit to a chemical test after being informed of the penalty of revocation for such refusal, the Secretary shall revoke the person's driver's license and/or driving privilege for a period of 1 year for a person with no previous violation of § 4177 of this title or this section or a similar statute of any state or the District of Columbia or local government, within 5 years of the date of the charge in question; 18 months' revocation for a person with 1 previous violation of such statutes as described above; and 24 months' revocation for a person with 2 or more previous violations of such statutes as described above.⁵

The language of the implied consent form provides that the officer will read the following statement to the defendant when a chemical test is sought:

I have probable cause to believe that you have driven, operated or had in actual physical control a vehicle while under the influence of alcohol or drugs in violation of Title 21 §4177 of the Motor Vehicle Laws of Delaware and/or Section 20-57 of the City of Newark Code. You are now under arrest for that violation. I request that you submit to the taking of samples of your breath for the purpose of chemical testing to determine the content of alcohol or a drug or drugs in your blood. If you refuse to submit to the test, a report of your refusal will be

⁴ 21 Del. C. §2740(a)

⁵ 21 *Del.C.* § 2742

forwarded to the Motor Vehicle Director who will revoke your license and/or privilege to drive a motor vehicle within this State for one year for the first offense, 18 months for the second offense or two years for the third or subsequent offense.⁶

Lundin argues that because Officer Sansone did not read this paragraph into the record at the DMV hearing, Lundin's license cannot be revoked for refusal to submit to a chemical test.

This argument was considered by the Superior Court in *Hicks v. Shaban*. There, the Court stated 21 Del. C. §2742 “indicates only two significant factors the driver should know and consider in order to make his decision regarding the breath test. One, that the driver's license will be revoked if the driver refuses to take the test; and two, the duration of the revocation. [Citation omitted] These are the only requirements.”⁷ The Court went on to note that “there is no requirement that the language of the implied consent form be placed verbatim on the record. Likewise, there is no requirement that the implied consent form be placed into evidence.”⁸

At the DMV hearing, Officer Sansone placed into evidence the implied consent form which he read to Lundin. (Transcript at page A017) He also stated he read the implied consent paragraph to Lundin twice, and gave him the form to read himself, which Lundin refused. This repeated notification regarding the consequences of refusal to submit to the intoxilyzer test clearly puts the defendant on notice of the consequences and meets the requirement of the statute.

⁶ The Newark Police Department Implied Consent and Probable Cause Form was submitted as part of the Appendix to Lundin's Opening Brief (A-051-052). The form was filled out by Officer Sansone and is not signed by Lundin.

⁷ *Hicks v. Shaban*, 1994 WL 710881 at 4 (Del. Super.)

⁸ *Id.*

Therefore I conclude substantial evidence exists to support the hearing officer's conclusions that Lundin refused a chemical test after being informed of the consequences for refusing to take the test. Accordingly the decision of the hearing officer revoking Lundin's license is AFFIRMED.

SO ORDERED

ALEX J. SMALLS
CHIEF JUDGE

Lundin-OP Jan 09