

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Rafael Smith :  
 :  
 v. : No. 1067 C.D. 2009  
 : Submitted: November 20, 2009  
 Commonwealth of Pennsylvania, :  
 Department of Transportation, :  
 Bureau of Driver Licensing, :  
 Appellant :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge  
 HONORABLE KEITH B. QUIGLEY, Senior Judge

*OPINION NOT REPORTED*

MEMORANDUM OPINION  
BY SENIOR JUDGE QUIGLEY

FILED: February 18, 2010

The Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (DOT) appeals from the April 29, 2009 order of the Court of Common Pleas of York County (trial court), which sustained the appeal of Rafael Smith (Licensee) challenging DOT's 365-day suspension of his driver's license pursuant to section 1539 of the Vehicle Code (Code).<sup>1</sup>

DOT notified Licensee that, due to a speeding violation on August 25, 2008, DOT was assessing him four points and, because he had accumulated twelve points and three prior suspensions, DOT was suspending his driver's license for

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<sup>1</sup> 75 Pa. C.S. §1539. Section 1539(a) of the Code authorizes DOT to suspend the operating privilege of a licensee whose driving record shows an accumulation of eleven or more points. The first suspension is for a period of five days for each point; the second suspension is for a period of ten days for each point; the third suspension is for a period of fifteen days for each point; and the fourth suspension is for a period of one year. 75 Pa. C.S. §1539(b).

365 days under Section 1539 of the Code. Licensee appealed, and a hearing was held before the trial court.

At the hearing, Licensee testified as follows. Someone was using his name fraudulently, and this fraudulent use caused his license to be suspended in the past and accounted for five of the twelve points showing on his driving record. To correct his driving record, Licensee had gone to Philadelphia Traffic Court in August 2007 and was acquitted of all Philadelphia violations.<sup>2</sup> In September 2008, Licensee filled out paperwork with DOT indicating the fraudulent use of his name, but Licensee never received a response from DOT. Licensee did not deny that he received speeding tickets in December 2007 and in August 2008, resulting in seven points.<sup>3</sup>

DOT, however, pointed out that Licensee received the five points he challenged under Section 1545 of the Code<sup>4</sup> when his driver's license was restored on August 16, 2007 from suspensions related to violations in Montgomery County and Allegheny County, not Philadelphia. (*See* R.R. at 64a, 74a). DOT presented evidence showing that DOT had suspended Licensee's driver's license in 2001

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<sup>2</sup> Licensee produced a document from the Philadelphia Traffic Court showing that his appeals of violations had been sustained.

<sup>3</sup> Licensee received five points for speeding in December 2007, but he received two points credit for passing an exam in January 2008. Licensee received four points for speeding in August 2008. (R.R. at 74a.)

<sup>4</sup> 75 Pa. C.S. §1545. Section 1545 of the Code states that, upon restoration of a person's operating privilege following a suspension imposed pursuant to Chapter 38 or Subchapter B of Chapter 15 of the Code, except a suspension imposed for failure to respond to a citation under Section 1533 of the Vehicle Code, 75 Pa. C.S. §1533, such person's record shall show five points.

under section 1786 of the Code<sup>5</sup> after Licensee failed to provide proof of financial responsibility in Montgomery County, (*see* R.R. at 70a, 73a, 76a, 108a), and in 2005 under section 1543 of the Code<sup>6</sup> after Licensee drove while under suspension in Allegheny County. (*see* R.R. at 65a, 74a, 78a, 107a).

In rebuttal, Licensee claimed that he knew nothing about the violation or suspension in Montgomery County in 2001. As for the 2005 Allegheny County violation and suspension, Licensee admitted that he paid the fine. However, Licensee explained that he was not aware that he had been driving while under suspension, and he paid the fine because he was a student without the time or money to fight the ticket and because the authorities threatened to tow his car. Licensee asserted that the suspension underlying the Allegheny County violation of driving while under a suspension was based on the Philadelphia violations, and because he was acquitted of the Philadelphia violations, DOT could not penalize him further for the Allegheny County suspension. (R.R. at 43a-46a.)

In considering the matter, the trial court believed that the Montgomery County violation and suspension were a result of the fraudulent use of Licensee's identity and that the Allegheny County violation stemmed from a suspension imposed pursuant to violations that were based on fraud. Thus, the trial court did not believe it was appropriate for DOT to impose five restoration points following those suspensions. Absent the five restoration points, Licensee did not accumulate

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<sup>5</sup> 75 Pa. C.S. §1786.

<sup>6</sup> 75 Pa. C.S. §1543. Section 1543(c) of the Code states that, following conviction for driving while under suspension, DOT shall suspend a person's driver's license an additional year. 75 Pa. C.S. §1543(c).

twelve points and, thus, was not subject to a suspension under section 1539 of the Code. Accordingly, the trial court sustained the appeal.

DOT filed a motion for reconsideration, in which DOT requested that the trial court consider imposing a lesser penalty, i.e., a 120-day suspension for twelve points and one prior suspension, under section 1539 of the Code based on the 2005 Allegheny County suspension. The trial court denied the request because the trial court concluded that Licensee had not accumulated twelve points. DOT now appeals to this court.<sup>7</sup>

As a preliminary matter, in this appeal, DOT does not dispute the fact that Licensee successfully appealed his Philadelphia citations. (*See* DOT's brief at 21.) Moreover, DOT now concedes that, in determining that Licensee had three prior suspensions, DOT improperly counted the Montgomery County suspension and another prior suspension imposed under section 1786 of the Code for failure to provide proof of financial responsibility. (*See* DOT's brief at 20-21.) This is because section 1539(c) of the Code authorizes DOT to count only those prior suspensions imposed under a provision of "this subchapter," i.e., Subchapter B of Chapter 15 of the Code, and section 1786 of the Code does not fall within that subchapter. 75 Pa. C.S. §1539(c).

We also note that section 1545 of the Code authorizes DOT to impose five restoration points only following a suspension imposed under Chapter 38 or Subchapter B of Chapter 15 of the Code. Thus, DOT lacked authority to impose five restoration points on Licensee following any of the suspensions imposed by

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<sup>7</sup> Our scope of review is limited to determining whether the trial court's findings are supported by competent evidence and whether the trial court committed an error of law or abused its discretion. *Todd v. Department of Transportation, Bureau of Driver Licensing*, 555 Pa. 193, 723 A.2d 655 (1999).

DOT under section 1786 of the Code. The only other “prior suspension” evidence offered by DOT to justify the suspension imposed in this case was the 2005 suspension for driving while under a suspension in Allegheny County.<sup>8</sup> Thus, in considering DOT’s arguments on appeal, we shall consider only whether DOT was authorized to suspend Licensee’s driver’s license for 120 days under section 1539 of the Code based on the 2005 Allegheny County suspension.

DOT first argues that the trial court erred in concluding that DOT improperly imposed five restoration points upon Licensee under section 1545 of the Code based on the 2005 Allegheny County suspension. We agree.

Here, DOT established a prima facie case of the 2005 Allegheny County suspension and the proper imposition of five restoration points following the suspension. *See Glidden v. Department of Transportation, Bureau of Driver Licensing*, 962 A.2d 9 (Pa. Cmwlth. 2008) (stating that, in a license suspension case, DOT bears the initial burden to establish a prima facie case). The burden of proof shifted to Licensee to produce clear and convincing evidence that DOT’s record was erroneous. *Id.* Toward that end, Licensee testified that the 2005 Allegheny County suspension was linked to the fraudulent use of his name. However, mere testimony does not constitute clear and convincing evidence to overcome the presumption that DOT properly suspended Licensee’s driver’s license and properly imposed five restoration points. *Fell v. Department of Transportation, Bureau of Motor Vehicles*, 925 A.2d 232 (Pa. Cmwlth. 2007).

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<sup>8</sup> Counsel for DOT stated that the certified documents in DOT’s Exhibit A provide “the basis for this suspension.” (R.R. at 39a.) Exhibit A contains only three suspension notices, viz. two suspension notices for violations of section 1786 of the Code and one suspension notice for the 2005 Allegheny County violation. (R.R. at 65a-72a.)

Thus, the trial court erred in concluding that Licensee had not accumulated twelve points. Moreover, because Licensee had accumulated twelve points and had one prior suspension, i.e., the 2005 Allegheny County suspension, DOT was authorized to suspend Licensee's driver's license for 120 days under section 1539 of the Code.

Accordingly, we reverse and reinstate DOT's suspension for a period of only 120 days.

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KEITH B. QUIGLEY, Senior Judge

Senior Judge Friedman dissents.

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Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

***ORDER***

AND NOW, this 18th day of February, 2010, the April 29, 2009 order of the Court of Common Pleas of York County is reversed and the Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing's suspension for a period of only 120 days is hereby reinstated.

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KEITH B. QUIGLEY, Senior Judge