IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Mirtaj,	:	
Appellant	:	
	:	
v.	:	No. 1440 C.D. 2009
	:	Submitted: December 24, 2009
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: May 28, 2010

Joseph Mirtaj (Licensee) appeals from an order of the Court of Common Pleas of Bucks County (trial court) that upheld a one-year suspension of his driver's license because Licensee refused to consent to chemical testing in violation of Section 1547(b)(1) of the Vehicle Code (Implied Consent Law).[1] We affirm.

On February 9, 2009, the Department of Transportation, Bureau of Driver Licensing (Department) notified Licensee that his operating privileges were being suspended for one year pursuant to the Implied Consent Law. Licensee appealed, and a *de novo* hearing was held on June 29, 2009.

[1] Section 1547(b)(1) of the Code, commonly referred to as the "Implied Consent Law," authorizes suspension of the driving privileges of a licensee where the licensee is placed under arrest for driving under the influence of alcohol, and the licensee refuses a police officer's request to submit to chemical testing. 75 Pa. C.S. §1547(b)(1).

At that hearing, Officer Richard Tucholski of the Hilltown Township Police Department testified that on January 25, 2009, he observed Licensee's car pick up speed as it moved into the center of Diamond Street. The officer stated that although his patrol car was traveling in excess of 80 miles per hour, he could not "[gain] ground on" Licensee's vehicle. Notes of Testimony, 6/29/09 (N.T. _____), at 4; Reproduced Record at 5a (R.R. __). According to Officer Tucholski, he then clocked the speed of Licensee's vehicle at 67.5 miles per hour in a 45 mile per hour zone, after which Licensee made a quick left onto Schultz Road without using a turn signal.

Officer Tucholski testified that he then activated his overhead lights and stopped Licensee. When he told Licensee why he had been stopped, Licensee denied speeding. In the course of this exchange, Officer Tucholski noticed signs of intoxication, including a strong odor of alcohol on Licensee's breath, bloodshot eyes, and slurred speech. Licensee failed three field sobriety tests and provided a "poor [breath] sample" that produced a reading of .10. N.T. 7; R.R. 8a. The officer arrested Licensee for driving under the influence of alcohol (DUI). Upon conducting an inventory of Licensee's vehicle, Officer Tucholski found a pipe with marijuana residue and a wooden device that held a small amount of marijuana in the center console.

Officer Tucholski transported Licensee to Grand View Hospital for chemical testing. Before leaving the scene of the traffic stop, Licensee told the officer that he would not submit to chemical testing without speaking to an attorney. Once inside the blood withdrawal room in the hospital, Officer Tucholski read verbatim the implied consent form, the DL-26 Form, to Licensee, which contains the warnings mandated by *Department of Transportation, Bureau of Traffic Safety v.*

O'Connell, 521 Pa. 242, 555 A.2d 873 (1989). According to the officer, Licensee stated twice that he wanted to speak to an attorney. Officer Tucholski testified that he specifically informed Licensee that his requests to speak to an attorney after being read the *O'Connell* warnings constituted a refusal to submit to chemical testing. When Licensee thereafter stated, "I refuse," Officer Tucholski deemed Licensee's response to be a refusal. N.T. 8; R.R. 9a.

On cross-examination, Officer Tucholski explained that he did not ask Licensee to sign the DL-26 Form because he has a policy of not providing intoxicated persons with a pen that could be wielded as a weapon. He stated that he has never permitted a person that he has arrested for DUI to sign the DL-26 Form.

In response to the Department's case, Licensee testified that he did not speed on the night of January 25, 2009, and that he did not have any trouble or difficulty completing the field sobriety tests. Further, he pointed out that he willingly repeated the breathalyzer test after the officer said his first sample was inadequate. He stated that he has a herniated disc which was causing severe pain because of the way his hands were cuffed behind his back. However, Officer Tucholski ignored Licensee's repeated pleas to adjust his handcuffs in order to relieve his pain, and this caused Licensee to feel "violated." N.T. 37; R.R. 38a.

Licensee admitted that Officer Tucholski read the *O'Connell* warnings to him. He further conceded that he stated, "I disagree," several times after the warnings were read. Licensee claims that he explained to Officer Tucholski that his reluctance to have blood drawn at Grand View Hospital stemmed from his knowledge that a patient had contracted a bacterial infection from a blood transfusion received at that facility. He testified that he told Officer Tucholski that he had concerns about

the safety of the hospital but that the officer did not allow him to voice his concerns. On cross examination, Licensee admitted he refused to take the blood test:

> **The Court:** You didn't answer the question. Did you refuse to take the test?
>
> **The Witness:** Yes, I did.

N.T. 43; R.R. 44a.

The trial court credited Officer Tucholski's testimony and found that the relevant aspects of Licensee's testimony were consistent with the officer's testimony. The trial court held that the Department met its burden of proving that Licensee was arrested for driving under the influence of alcohol; that the arrest was based on probable cause; that there was a request that Licensee submit to a blood test and that Licensee refused; and that the warnings had been given to Licensee prior to the request for testing. Accordingly, the trial court upheld the Department's one-year suspension of Licensee's operating privileges. Licensee now appeals to this Court.

On appeal,[2] Licensee argues that the Department did not sustain its burden of proof in establishing that he made a knowing and conscious refusal to take a blood test. In support, Licensee presents three arguments. First, Licensee contends that he was afraid to submit to the blood test because he did not think that qualified medical personnel would perform the blood test and because Grand View Hospital had been connected to a "bad encounter with a blood transfusion." N.T. 40; R.R. 41a. Further, Licensee argues that he performed a breathalyzer test and that the

---

[2] This Court's scope of review is limited to determining whether the trial court's findings are supported by competent evidence, whether errors of law have been committed or whether the trial court's determinations demonstrate a manifest abuse of discretion. *Finnegan v. Department of Transportation, Bureau of Driver Licensing*, 844 A.2d 645, 647 n.3 (Pa. Cmwlth. 2004).

officer was only entitled to require one type of chemical test. Finally, Licensee contends that because he did not sign the DL-26 Form, there is no basis to conclude that he refused chemical testing.[3]

The Department counters that Licensee seeks to burden the Department with proving that Licensee knowingly and consciously refused to take a blood test. The Department contends that once it satisfied its *prima facie* burden of proof under *Martinovic v. Department of Transportation, Bureau of Driver Licensing*, 881 A.2d 30 (Pa. Cmwlth. 2005), the burden shifted to Licensee to prove that his refusal was *not* knowing and conscious. Further, the Department contends that each of Licensee's three arguments lack merit.

To sustain a license suspension under Section 1547 of the Vehicle Code, 75 Pa. C.S. §1547, the Department bears the burden of proving that the driver (1) was placed under arrest by an officer who had reasonable grounds to believe he was driving while under the influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was specifically warned that a refusal would result in the suspension of his or her driver's license. *Martinovic*, 881 A.2d at 34. To satisfy the "specific warning" requirement, "a precisely enunciated warning that a driver's license *will be* revoked" must be given. *Everhart v. Commonwealth*, 420 A.2d 13, 15 (Pa. Cmwlth. 1980) (emphasis added). If the Department satisfies its initial burden as found in *Martinovic*, the burden shifts to the licensee to show that his refusal was not knowing or conscious or that he was physically unable to take the

[3] Licensee alleged in his Concise Statement of Matters Complained of on Appeal that Officer Tucholski lacked probable cause or reasonable suspicion to stop Licensee's vehicle. However, Licensee did not include this issue in his statement of questions involved nor did he discuss the issue in his brief. Accordingly, the issue is waived. Pa. R.A.P. 2116(a) ("No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.").

test. *Yoon v. Department of Transportation, Bureau of Driver Licensing*, 718 A.2d 386, 388 (Pa. Cmwlth. 1998). Questions of credibility are for the trial court. *Department of Transportation, Bureau of Traffic Safety v. O'Connell*, 521 Pa. 242, 248, 555 A.2d 873, 875 (1989).

Licensee first contends that he did not submit to the blood test because he did not think that qualified medical personnel would perform the blood test and because he had safety concerns about Grand View Hospital. Specifically, Licensee claims to have told Officer Tucholski that he was concerned that the person who would draw his blood appeared to be a janitorial worker rather than a medical professional. Further, Licensee says he explained to the officer that he was fearful of being infected with a disabling disease because he knew a patient who contracted a bacterial infection from a blood transfusion at Grand View Hospital.

The Department responds that Licensee's putative safety concerns do not prove that he was unable to make a knowing and conscious decision to refuse the blood test or was physically unable to take the blood test. We agree.

This Court's holding in *Patterson v. Department of Transportation, Bureau of Driver Licensing*, 582 A.2d 700 (Pa. Cmwlth. 1990), established that Licensee's health concerns about the hospital facilities and the qualifications of personnel do not constitute a legal justification for refusing to undergo the required blood alcohol test. In *Patterson*, this Court held that the licensee's fear of contracting a disease and the Department's failure to provide the licensee with proof that a phlebotomist was properly trained did not justify her refusal to submit to a blood test, stating

> [t]his case is controlled by *McCullough v. Department of Transportation, Bureau of Traffic Safety*, 122 Pa. Commonwealth Ct. 415, 420, 551 A.2d 1170, 1173 (1988), which held: "[t]his

> Court expressly determines here that a fear of contracting AIDS, as well as hepatitis or any other disease, from the administration of a blood alcohol test does not constitute a legitimate basis or legal justification for refusing to undergo a required blood alcohol test."

Patterson, 582 A.2d at 701. In short, Licensee's argument that he was unable to make a knowing and conscious decision to refuse the blood test lacks merit.

Licensee next argues that the breathalyzer test administered at the scene of the traffic stop was the only chemical test that the officer was entitled to require of him. Licensee contends that Officer Tucholski never informed him that the breath test was inadequate and that the DL-26 Form establishes that the arresting officer has a single choice of chemical tests: blood, breath or urine.

The Department counters that this Court's precedent has established that subjective confusion on the part of Licensee about the role of the pre-arrest breath test does not excuse him from the requirement to submit to a properly requested chemical test. Again, we agree.

In *Ryan v. Department of Transportation, Bureau of Driver Licensing*, 823 A.2d 1101 (Pa. Cmwlth. 2003), a licensee claimed she was confused over her responsibility to submit to a blood test after she underwent a breathalyzer test. This Court held that completion of a pre-arrest breath test does not satisfy the chemical testing requirement of 75 Pa. C.S. §1547(a)(1). *Ryan*, 823 A.2d at 1104. In doing so, we reaffirmed *Wall v. Commonwealth*, 539 A.2d 7, 9 (Pa. Cmwlth. 1988), which established that

> a preliminary breath test in the field, performed on an instrument which detects the presence of alcohol, is not one of the chemical tests of breath, blood or urine deemed to be consented to by section 1547(a).

539 A.2d at 9. In *Ryan*, the Court further explained that the results of a post-arrest chemical test are more likely to be admissible in subsequent criminal and civil actions, than are the results of a pre-arrest breath test. Based on our holdings in *Wall* and *Ryan*, Licensee's argument that he did not have to submit to a blood test because he had taken a pre-arrest breath test lacks merit.

Finally, Licensee contends that he was not given an opportunity to sign the DL-26 Form. He claims that Department policy requires formalities which exceed statutory requirements in order to provide a licensee with the opportunity "to understand the gravity of his alleged refusal." Petitioner's Brief at 10. Therefore, he argues that this Court should not second guess the Department's choice to require that a licensee sign and date a DL-26 Form in order to show that he has knowingly and consciously refused to undergo chemical testing.

The Department responds that a licensee's signature on the DL-26 Form is not required by statute or by any Department regulation. Rather, a licensee's signature on the form is merely one type of evidence that can be used to prove that the arresting officer provided the required warnings.

Licensee does not dispute that Officer Tucholski provided the *O'Connell* warnings; indeed, Licensee specifically admitted to the trial court that he refused to submit to the blood test after the warnings were read to him verbatim. Accordingly, it is immaterial whether Licensee signed the implied consent warnings form.

The Pennsylvania Supreme Court has held that a police officer's duty under the Implied Consent Law is satisfied when he conveys the proper warnings to the licensee. *Department of Transportation, Bureau of Driver Licensing v. Scott*, 546 Pa. 241, 254, 684 A.2d 539, 546 (1996). This Court further explained in *Martinovic* that an officer's sole duty is to inform a licensee of the implied consent warnings, and

an officer has no duty to make sure that the licensee understands the warnings. By his own admission, Licensee refused a test authorized by the Implied Consent Law. Licensee's "self-induced and self-destructive confusion about what the law is or should be" is not a defense. *Appeal of Attleberger*, 583 A.2d 24, 27 (Pa. Cmwlth. 1990).

For the foregoing reasons, we affirm the trial court.

_____

MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Mirtaj, Appellant	:	
v.	:	No. 1440 C.D. 2009
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing	:	

O R D E R

AND NOW, this 28th day of May, 2010, the order of Court of Common Pleas of Bucks County dated June 29, 2009, in the above-captioned matter is hereby AFFIRMED.

_____

MARY HANNAH LEAVITT, Judge