

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alana Nicole Hoffmaster, :  
Appellant :  
v. :  
Commonwealth of Pennsylvania, :  
Department of Transportation, : No. 1458 C.D. 2010  
Bureau of Driver Licensing : Submitted: December 23, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: February 2, 2011

Alana Nicole Hoffmaster (Licensee) appeals the order of the Court of Common Pleas of Berks County (trial court) that dismissed her appeal from a one-year suspension of her operating privilege pursuant to Section 1547(b)(1) of the Vehicle Code (Code), 75 Pa.C.S. §1547(b)(1).<sup>1</sup>

By official notice dated November 6, 2009, the Department of Transportation, Bureau of Driver Licensing (DOT) informed Licensee that her

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<sup>1</sup> Section 1547 of the Code provides:

**(b) Suspension for refusal.-**

(1) If any person placed under arrest for a violation of section 3802 [relating to driving under the influence of alcohol or controlled substance] is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person... (i)... for a period of 12 months.

operating privilege was suspended for one year, effective December 11, 2009, as a result of her refusal to submit to chemical testing on October 10, 2009. Licensee appealed to the trial court.

At hearing, Sergeant Steve Schaeffer (Sergeant Schaeffer), a patrolman for the Exeter Police Department, testified that on October 9, 2009, at approximately 2:45 a.m.:

I was traveling westbound just east of Stonetown Road, and I observed a vehicle in front of me to be weaving within its lane. Upon noticing that, I continued to follow the vehicle. I observed it to swerve over the right side of the road, twice over the fog line and then three times across the dash white lines into the passing lane. [I] initiated a vehicle stop.

Notes of Testimony (N.T.), June 23, 2010, at 5; Reproduced Record (R.R.) at 12a.

Sergeant Schaeffer approached Licensee and “observed her to have bloodshot, watery, and glassy eyes . . . I also observed a strong odor of alcoholic beverage coming from her person.” N.T. at 5-6; R.R. at 12a. Licensee responded to the vehicle stop and told Sergeant Schaeffer that “she had swerved because she had been . . . pushing the buttons on her Bluetooth.” N.T. at 6; R.R. at 12a. Sergeant Schaeffer asked Licensee to perform field sobriety tests.

Sergeant Schaeffer stated:

Ms. Hoffmaster [Licensee] couldn’t keep her balance during the instruction portion of the test. During the walking part, she missed heel to toe every single step by about 18 inches. She did an improper turn. She stepped

off the line two times on the way back, and she raised her arms for balance.

....

On the one leg stand<sup>[2]</sup> . . . [s]he put her foot down three times, and she swayed hard a few times. And she raised her arms a few time.

H.T. at 9; R.R. at 13a. Licensee failed the tests.

After the field sobriety tests, Sergeant Schaeffer administered a preliminary breath test to Licensee. Licensee tried to “cheat the test.” N.T. at 27; R.R. at 17a. “The straw will actually whistle” if the person performs the test correctly. N.T. at 30; R.R. at 18a. “She was making a sucking noise.” N.T. at 30; R.R. at 18a. On a later attempt Licensee stopped blowing early so the device did not receive a full breath sample. N.T. at 30; R.R. at 18a. Nevertheless, the test registered a positive result of .17 for alcohol. N.T. at 30; R.R. at 18a.

Based on the results of the field sobriety tests and the preliminary breath test, Sergeant Schaeffer placed Licensee under arrest for driving under the influence. Licensee argued about the arrest and she refused to turn around to be handcuffed so Sergeant Schaeffer had to “physically use my arm to turn her around and handcuff her.” N.T. at 10; R.R. at 13a. Licensee yelled that she wanted to speak to a different officer. N.T. at 10; R.R. at 13a. Sergeant Schaeffer had to “repeat several times” that she had to get into the car before she did so. N.T. at 10; R.R. at 13a.

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<sup>2</sup> Sergeant Schaeffer instructed Licensee “to raise one foot approximately 6 inches above the ground straight out in front of her with her foot pointed forward . . . [s]he’s to keep her arms down at her side . . . watch her foot . . . [a]nd count out loud for 30 seconds counting one, one-thousand, two, one –thousand.” H.T. at 9; R.R. at 13a.

Sergeant Schaeffer took Licensee to the DUI Center. On the way to the Center, Licensee stated that she was “not a crack head” and that she knew she should not have been driving. N.T. at 12; R.R. at 13a. Licensee “initially... was unsure that she was going to take [the test] and then she made a decision that she would.” N.T. at 12; R.R. at 13a.

Licensee “was uncooperative and refused to give most of her information other than her name.” N.T. at 33; R.R. at 19a. Sergeant Schaeffer had to “go out to my car on the computer and get [the information] anyway.” N.T. at 11; R.R. at 13a. While he was retrieving the information, Licensee wrote her social security number on paper for the secretary because she did not want to give the information aloud. Sergeant Schaeffer then put her in the custody of the county detective, Detective Eric Pistilli (Detective Pistilli). N.T. at 32; R.R. at 18a.

Detective Pistilli also testified on behalf of DOT. Detective Pistilli advised Licensee that everything was audio and video recorded. N.T. at 34; R.R. at 19a. A phlebotomist was present in the room. N.T. at 34; R.R. at 19a. Licensee refused to take the blood test and went into the bathroom. After the refusal, Detective Pistilli had Licensee perform three field sobriety tests. N.T. at 35; R.R. at 19a. She took off her shoes for the first test, “the walk and turn.” She could not keep her balance during the instruction phase. She missed the heel to toe and raised her arms on the first nine steps and missed the heel to toe in the second nine steps in the performance phase. N.T. at 36; R.R. at 19a. However, she passed the one leg stand and the finger to nose tests. N.T. at 37; R.R. at 20a.

Upon cross-examination, Detective Pistilli testified that he did not know if the Berks County Health Department or the Pennsylvania Department of Health inspected the DUI Center. Different phlebotomists work at the DUI Center at various times. N.T at 48; R.R at 22a.

In response, Licensee testified that Sergeant Schaeffer had not allowed her to finish the heel to toe test before he had arrested her, and that he never asked her to perform a one leg stand. N.T. at 56-57; R.R. at 24a- 25a. She also testified that while waiting to be processed at the DUI Center:

Officer Schaeffer put me on the bench . . . [a]nd I was cuffed to that bench. And officer Schaeffer went out and got the form that I had to read and sign. I believe it was the DL-26 I believe it was called. And he read it to me while another officer was making comments and saying things to me from another police department jurisdiction. And I expressed to Officer Schaeffer I couldn't hear what he was saying and I was getting frustrated by the comments which were made by this other officer which were definitely inappropriate. And he told me to pay attention to what he was saying and ignore the other officer which I did then I signed the paper and waited to be taken back.

H.T. at 58; R.R. at 25a. Neither Sergeant Schaeffer nor Detective Pistilli heard these remarks. N.T. at 42 and 64; R.R. at 21a and 26a.

Additionally, Licensee stated that “[t]here was a few people that were arrested sitting there . . . other officers from another police department [were] trying to calm down a guy who was stating to them that he had HIV.” N.T. at 60; R.R. at 25a. “I was horrified because no one answered if he really did have HIV or not. And he went in before me so I was scared considering how the flow was

going in and out, that it wasn't cleaned up properly, if they did draw his blood." H.T. at 62; R.R. at 62. "I refused [the blood test] . . . [a]nd I said I'd rather take that chance than a life sentence with HIV or Hepatitis . . . [a]nd he sat me back on the bench so I could leave." N.T. at 62; R.R. at 26a.

Detective Pistilli testified he was the person who had processed everyone that day, and he was not told that the man was HIV positive. Licensee admitted that she did not inform Detective Pistilli about the reason for her refusal. Upon her release from the DUI Center, Licensee did not report to any hospital to have her blood drawn. N.T. at 64; R.R. at 26a.

The trial court dismissed Licensee's appeal and concluded that "it was irrelevant whether or not the DUI Center was an approved facility for the collection of blood samples" . . . that "[t]he phlebotomist was . . . a qualified person within the meaning of 75 [Pa.]C.S.A. §1547(c)" . . . and that "[t]his court did not find Licensee's testimony credible." Opinion of the Trial Court, September 9, 2010, at 5-6.

Licensee filed a statement of matters of errors complained of on appeal pursuant to Pa. R.A.P. 1925(b) and alleged<sup>3</sup>:

1. The Department of Transportation failed to demonstrate, when challenged, that the facility where the

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<sup>3</sup> This Court's review is limited to determining whether the trial court's findings are supported by competent evidence, whether errors of law were committed, or whether the trial court committed an abuse of discretion in making its determination. *Department of Transportation v. Renwick*, 543 Pa. 122, 669 A.2d 934 (1996).

blood was drawn and the person who was to draw the blood of appellant were qualified under 75 Pa.C.S. §1547 (c), the Clinical Laboratory Act, 35 P.S. §§2151 *et seq.*, the pertinent regulations of the Pennsylvania Department of Health, 28 Pa. Code §§5.24, 5.41, and 5.101 *et seq.* and the laws governing the practice of medicine and the healing arts.

2. Given the lack of qualification, or identification of the person who was to draw the blood, and the filthy and chaotic conditions at the place where the blood was to be drawn (including the presence of a person claiming to have HIV), proper conditions under which appellant was required to provide a blood sample were not established, or constituted additional, unauthorized requirements, so her refusal to provide the sample was justified.

3. This court erred in finding appellant's implied consent to a chemical test of blood extended to these conditions.

4. Given the lack of qualification, or identification, of the person who was to draw blood, and the filthy and chaotic conditions at the place the blood was to be drawn, the demand to draw blood was an unreasonable search and seizure.

Statement of Errors Complained of on Appeal by Petitioner-Appellant Alana Nicole Hoffmaster, August 18, 2010, Paragraphs 1-4 at 1-2; R.R. at 33a-34a.

These issues<sup>4</sup> were raised and argued before the trial court and ably disposed of in the cogent opinion of the Honorable Jeffrey K. Sprecher. Therefore,

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<sup>4</sup> In cases involving the suspension of a driver's license for a refusal to submit to chemical testing, DOT must prove that Licensee: (1) was arrested for a violation of 75 Pa.C.S. §3802; (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 her operating or driving privilege and would result in her being subject to the penalties set forth in 75 Pa.C.S. §3804(c) (relating to penalties) if she were later convicted of violating 75 Pa.C.S. §3802(a)(1). *Martinovic v. Department of Transportation, Bureau of Driver Licensing*, 881 A.2d 30, 34 (Pa. Cmwlth. 2005).

this Court shall affirm on the bases of that opinion.<sup>5</sup> Alana Nicole Hoffmaster v. Pennsylvania Department of Transportation, (No. 09-16187) filed September 10, 2010.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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<sup>5</sup> Licensee raises an additional argument on appeal to this Court for the first time: “Is a license suspension unsupported by substantial evidence when some essential findings of fact are unsupported by evidence, others are based on testimony that is contradicted by a video recording in evidence, and others considered essential by the trial court were irrelevant.” (emphasis added). Statement of Questions Involved, Brief for Appellant Alana Nicole Hoffmaster at 3.

Pa. R.A.P. 302(a) provides that “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Therefore, this Court will not address this issue.



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Bureau of Driver Licensing	:	

**ORDER**

AND NOW, this 2<sup>nd</sup> day of February, 2011, the decision of the Court of Common Pleas of Berks County is affirmed.

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BERNARD L. MCGINLEY, Judge