

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Kevin M. Cooney, Jr.,	:	
Appellant	:	
	:	
v.	:	No. 2058 C.D. 2010
	:	
Commonwealth of Pennsylvania,	:	Submitted: January 28, 2011
Department of Transportation,	:	
Bureau of Driver Licensing	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: March 24, 2011**

In this appeal,<sup>1</sup> Kevin M. Cooney, Jr. (Licensee) seeks review of an order of the Court of Common Pleas of Montgomery County (trial court) that denied his statutory appeal from a one-year suspension of his driver’s license. The Department of Transportation, Bureau of Driver Licensing (Department) suspended Licensee’s driving privilege for one year under 75 Pa. C.S. §1547(b)(1) as a result of his refusal to submit to chemical testing. Licensee contends the trial court erred in denying his appeal where the Department failed to establish the arresting officer had reasonable grounds to believe Licensee was under the influence of alcohol or a controlled substance. Upon review, we affirm.

---

<sup>1</sup> Previously, in Cooney v. Department of Transportation, Bureau of Driver Licensing, (Pa. Cmwlth., No. 1023 C.D. 2009, filed November 16, 2009) (Simpson, J.), we reversed an earlier order of the trial court that denied the Department a continuance when its sole witness, under subpoena, could not be located at the time of the hearing. It was later learned that he suffered a medical emergency. We also vacated the court’s order sustaining Licensee’s appeal and remanded the case for a hearing on the merits.

## Background

In December, 2008, the Department notified Licensee of the one-year suspension of his driving privilege based on his refusal to submit to chemical testing after being arrested for DUI. Licensee appealed the suspension to the trial court.<sup>2</sup>

At hearing, the only witness was Conshohocken Police Officer David R. Lennon (Police Officer), who testified as follows. On the evening of October 12, 2008, Police Officer observed a Ford Escape travelling east at a high rate of speed on West 7<sup>th</sup> Avenue in Conshohocken. Reproduced Record (R.R.) at 13a. The vehicle failed to stop for a stop sign. Id. Police Officer had trouble catching up to the vehicle, but eventually got its license plate number. Id.

Police Officer followed the vehicle, which stopped at a red light at the intersection of West 9<sup>th</sup> and Fayette. Id. Although the light turned green, the vehicle sat there for an unreasonable amount of time. Id. When the vehicle proceeded, Police Officer activated his emergency lights and siren and attempted a stop. Id. However, the driver, later identified as Licensee, did not pull over. Id.

---

<sup>2</sup> To uphold a suspension under 75 Pa. C.S. §1547(b)(1), the Department must establish at the appeal hearing that Licensee (1) was arrested for DUI “by a police officer who had reasonable grounds to believe that the licensee was operating a vehicle while under the influence of alcohol or a controlled substance; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was warned that a refusal would result in a license suspension.” Schindler v. Dep’t of Transp., Bureau of Driver Licensing, 976 A.2d 601, 604 (Pa. Cmwlth.), appeal denied, 603 Pa. 706, 983 A.2d 1250 (2009) (emphasis added).

Licensee stopped at a red light at West 11th and Fayette. Id. at 14a. Police Officer still had his lights and siren on, but Licensee refused to pull over. Id. The light turned green, and Licensee continued northbound on Fayette, changing to the inside lane then back to the outside lane. Id. Police Officer then pulled up next to Licensee, who was now driving slowly, and made eye contact with him. Id. Police Officer motioned and yelled to Licensee to pull over, but he again failed to do so. Id. at 14a-15a.

Police Officer then decided to stop Licensee, who appeared clearly intoxicated. Id. He pulled his patrol car in front of Licensee's vehicle and forced him to a stop by the curb. Id. At that time, both Police Officer and Licensee had their windows down. Id. Police Officer commanded Licensee to put the vehicle in park, turn it off and toss his keys out the window. Id. Licensee put the vehicle in park and turned off the engine. Id. However, he refused to toss out the keys. Id.

Licensee then put the keys back in the ignition and started his vehicle. Id. at 16a. Police Officer, still in his patrol car, sprayed Licensee with mace. Id. Police Officer then exited his patrol car, reached into Licensee's vehicle, and shut it off. Id. He then removed Licensee from his vehicle and placed him in custody. Id.

While in custody, Licensee appeared clearly intoxicated, as he could not stand on his feet, speak or answer simple questions. Id. Police Officer transported Licensee to a hospital and attempted to obtain a blood sample. Id. He read Licensee the Implied Consent Law verbatim, several times. Id. at 16a-17a.

He gave Licensee several opportunities to submit to a blood test. Id. at 17a. Licensee refused several times. Id. Police Officer then transported Licensee to the station and arranged a ride for him. Id. Thereafter, Police Officer filed charges. Id.

At hearing, the Department also submitted the Form DL-26 (Chemical Testing Warnings and Refusal Report) Police Officer filled out at the hospital, and other certified documents related to the case. These items were admitted into evidence without objection. Id. at 18a-20a.

In response, Licensee demurred to the Department's presentation of its case. He argued Police Officer's testimony failed to establish he had reasonable grounds to believe Licensee was operating a vehicle in violation of 75 Pa. C.S. §3802 (DUI). Police Officer merely testified Licensee appeared "intoxicated," without specifying that Licensee appeared to be under the influence of alcohol or a controlled substance. Licensee argued a person who appears intoxicated may be sick or suffering from a medical condition such as low blood pressure.

The trial court denied Licensee's demurrer without prejudice, allowed the parties an opportunity to file briefs, and continued the case for one week. At the second appeal hearing, the trial court again denied the demurrer. The court reasoned:

[W]e've come to the inescapable conclusion that it is not necessary for the officer to use the words alcohol and/or controlled substances; that the word intoxicated is sufficient when taking into account all of the other testimony given by the officer and circumstances that

gave rise to the stop; and considering all of those circumstances, it was clear by implication that the officer's testimony was sufficient to survive the demurrer. So the demurrer is denied.

Id. at 49a-50a.

Licensee then argued our decision in Schindler v. Department of Transportation, Bureau of Driver Licensing, 976 A.2d 601 (Pa. Cmwlth.), appeal denied, 603 Pa. 706, 983 A.2d 1250 (2009) is applicable. In Schindler, we held the arresting officer lacked reasonable grounds to believe the licensee had been driving under the influence of alcohol or drugs based solely on his failure to pass the one-leg stand and walk-and-turn field sobriety tests. The licensee had just crawled out of his overturned vehicle following a rollover accident. Here, Licensee asserted, he had trouble standing or answering questions after being maced.

The trial court distinguished Schindler on its facts and denied Licensee's appeal. Also, the trial court noted that Police Officer observed Licensee driving through Conshohocken "blowing stop signs," exceeding the speed limit, stopping too long at traffic lights, disregarding multiple requests to pull over, and, upon being forced to the side of the road, disobeying an instruction to toss the keys out of the vehicle. See R.R. at 53a-54a. The distance travelled, Licensee's non-responsiveness to Police Officer's requests, and his attempt to drive away after being stopped, "are all additional facts which very easily lead the officer to the conclusion the individual is intoxicated." Id. at 57a. Licensee appeals.<sup>3</sup>

---

<sup>3</sup> Our review is limited to determining whether the trial court's necessary findings of fact were supported by substantial evidence or whether the court committed an error of law or **(Footnote continued on next page...)**

## **Issue**

Licensee again contends the trial court erred in denying his appeal from a suspension under 75 Pa. C.S. §1547(b)(1) (refusal to submit to chemical testing) because the Department failed to establish Police Officer had reasonable grounds to believe Licensee was under the influence of alcohol or drugs.

## **Discussion**

Licensee argues that Police Officer's testimony fails to establish any connection whatsoever between Licensee's driving and alcohol or a controlled substance. Police Officer never asked Licensee if he had been drinking or doing drugs. Licensee never stated he had been drinking or doing drugs. Police Officer did not testify he saw or smelled any alcohol on or around Licensee.

In order for the Department to suspend a person's driver's license for refusal of chemical testing, 75 Pa. C.S. §1547 requires that a police officer have reasonable grounds to believe the person to be in violation of 75 Pa. C.S. §3802 (DUI), as that provision relates to driving under the influence of alcohol or a controlled substance. Specifically, Section 1547 provides:

**(a) General Rule.**—Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given

---

**(continued...)**

otherwise abused its discretion. Reinhart v. Dep't of Transp., Bureau of Driver Licensing, 954 A.2d 761 (Pa. Cmwlth. 2008). In reviewing a license suspension appeal, we may not make new or different findings of fact. Id. Rather, we will only review the trial court's findings to determine if they are supported by the record. Id. In doing so, we review the evidence in the light most favorable to the prevailing party. Id.

consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle:

(1) in violation of section ... 3802 (relating to driving under the influence of alcohol or a controlled substance)  
...

75 Pa. C.S. §1547(a)(1).

Here, Licensee asserts, Police Officer determined Licensee to be “intoxicated” based on the traffic violations, slurred speech, unsteadiness on his feet and his inability to follow simple commands. For purposes of argument, Licensee stipulates Police Officer had reasonable grounds to pull him over for violations of the Vehicle Code.<sup>4</sup> Although Licensee concedes the traffic violations, he contends the other factors cited by Police Officer resulted from being maced. Traffic violations alone are not an indicator of intoxication. See Stancavage v. Dep’t of Transp., Bureau of Driver Licensing, 986 A.2d 895 (Pa. Cmwlth. 2009), appeal denied, \_\_\_ Pa. \_\_\_, 995 A.2d 355 (2010) (speeding and following too closely, do not by themselves, provide reasonable grounds for police officer to believe licensee was driving under the influence of intoxicating substances).

Further, Licensee asserts, being sprayed with mace provides a reasonable explanation for his slurred speech and unsteadiness on his feet. See Schindler (absent evidence of intoxication, rollover accident provided reasonable

---

<sup>4</sup> 75 Pa. C.S. §§101-9805.

explanation for failure to pass field sobriety tests). Mace is intended to disable an individual; it causes dizziness, extreme general discomfort and accelerated secretion of saliva. Therefore, Licensee urges, the Department's evidence fails to establish Police Officer had reasonable grounds to believe he was driving while under the influence of alcohol or a controlled substance. Stancavage; Schindler.

We disagree. "Reasonable grounds exist when a person in the position of the police officer, viewing the facts and circumstances as they appeared at the time, could have concluded that the motorist was operating the vehicle while under the influence of an intoxicating substance." Marone v. Dep't of Transp., Bureau of Driver Licensing, 990 A.2d 1187, 1190 (Pa. Cmwlth. 2010). This is determined by reviewing evidence as a whole, including the licensee's general appearance and behavior. Id.

The test for determining whether "reasonable grounds" existed is not very demanding. Hasson v. Dep't of Transp., Bureau of Driver Licensing, 866 A.2d 1181 (Pa. Cmwlth. 2005). A police officer may rely on his experience and personal observations in rendering an opinion as to whether a driver is intoxicated. Id. Unruly, disorderly or unusual conduct is a sign of intoxication. Id.

After reviewing the totality of the circumstances, we agree with the respected trial court that Licensee's unruly or disorderly conduct prior to being maced could be objectively construed as intoxicated behavior. Id. In particular, Licensee's repeated failure to respond to Police Officer's directions to pull over and his attempt to drive away from a forcible traffic stop provided Police Officer



with reasonable grounds to believe Licensee was driving under the influence of alcohol or a controlled substance, in violation of 75 Pa. C.S. §3802. Hasson. These circumstances support Police Officer's lay opinion that Licensee was clearly intoxicated at the time he was stopped.

Further, although Police Officer did not testify he detected an odor of alcohol on Licensee, the absence of such testimony will not render Police Officer's other observations insufficient to establish reasonable grounds to believe Licensee was driving while under the influence of alcohol or drugs. See Pickens v. Dep't of Transp., Bureau of Driver Licensing, 618 A.2d 474 (Pa. Cmwlth. 2010) (police officer need not detect odor of alcohol to have reasonable grounds to believe a person is driving under the influence of alcohol or drugs; a driver's bizarre behavior may provide such reasonable grounds).

Finally, although Licensee attributes his condition to being maced, the existence of a reasonable alternative conclusion does not preclude the officer's actual belief from being reasonable. Keane v. Dep't of Transp., 561 A.2d 359 (Pa. Cmwlth. 1989).

For all these reasons, we affirm.

---

ROBERT SIMPSON, Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Kevin M. Cooney, Jr.,	:	
Appellant	:	
	:	
v.	:	No. 2058 C.D. 2010
	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing	:	

**ORDER**

**AND NOW**, this 24<sup>th</sup> day of March, 2011, the order of the Court of Common Pleas of Montgomery County is **AFFIRMED**.

---

ROBERT SIMPSON, Judge