

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	
	:	
v.	:	No. 2092 C.D. 2009
	:	SUBMITTED: May 14, 2010
Theophilus Pitter	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: June 10, 2010**

The Department of Transportation, Bureau of Driver Licensing (Department) appeals from an order of the Court of Common Pleas of Philadelphia County, which sustained the statutory appeal of Theophilus Pitter from a one year disqualification of his commercial driving privilege stemming from Pitter's entry into Accelerated Rehabilitative Disposition (ARD) after being charged with driving under the influence (DUI) in violation of 75 Pa. C.S. § 3802.<sup>1</sup> We affirm.

Before common pleas, the Department introduced evidence that Pitter had entered into an ARD for the DUI charge, and that he had received notice of his

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<sup>1</sup> Pitter was precluded from filing a brief as a result of his failure to file in the time allowed.

commercial driving privilege disqualification. Pitter's counsel then "hand[ed] up" to the judge what was apparently an order from the court handling Pitter's DUI proceedings, allowing Pitter to voluntarily withdraw from the ARD program. Reproduced Record (R.R.) at 19a. Counsel then argued that because Pitter had withdrawn from the program and was now awaiting trial on the DUI charges, the disqualification should be lifted. Counsel for the Department agreed Pitter's counsel had accurately cited *Kolva v. Department of Transportation*, 977 A.2d 1248 (Pa. Cmwlth. 2009) (*en banc*), *petition for allowance of appeal denied*, \_\_\_ Pa. \_\_\_, 990 A.2d 731 (2010). Department's counsel did not, however, concede that Pitter's license should be reinstated, but instead opposed that relief based on legal arguments being raised in the Department's petition for allowance of appeal of this court's decision in *Kolva*. Common pleas sustained Pitter's appeal and the Department appealed to this court.

In the Department's Rule 1925(b) statement of errors complained of on appeal, the Department argued that "[t]o the extent the trial court was bound by [*Kolva*], the Department respectfully submits that *Kolva* was wrongly decided. . . ." R.R. at 39a. The Department then made a motion to this court to supplement the record with the motion that was "handed up" to the judge below. This court, per the Honorable Barry F. Feudale, Senior Judge, denied the motion, because "while the transcript of the hearing below refers to counsel 'handing up' an order granting appellee's voluntary withdrawal from ARD, the transcript does not reflect that the motion was admitted into evidence by the trial court." Order of February 5, 2010.

Now, in its brief to this court, the Department argues that because the order allowing Pitter to withdraw from ARD was never admitted, the decision below was not supported by evidence of record. This argument, however, is an

entirely different reason for reversal than the one expressed in the Department's Rule 1925(b) statement. As this argument was not included in the statement, it is waived. Pa. R.A.P. 1925 (b)(4)(vii). Because the Department's brief contains only arguments which are waived, the decision below must be affirmed.<sup>2</sup>

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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<sup>2</sup> We will, however, modify the order below to clarify that the reinstatement of Pitter's commercial driving privilege is without prejudice to the Department again imposing a disqualification in the event that Pitter is ultimately convicted in the underlying DUI case.

