

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James Gallagher :  
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 v. :  
 :  
 Commonwealth of Pennsylvania, :  
 Department of Transportation, :  
 Bureau of Driver Licensing, : No. 2097 C.D. 2009  
 Appellant : Submitted: July 30, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
 HONORABLE PATRICIA A. McCULLOUGH, Judge  
 HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
 BY JUDGE PELLEGRINI

FILED: August 19, 2010

The Department of Transportation, Bureau of Driver Licensing (Department) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court) sustaining the appeal of James Gallagher (Licensee) and rescinding the Department's one-year suspension of his driving privilege because he was a first-time offender convicted and sentenced under Section 3802(a)(1) of the Vehicle Code<sup>1</sup> and, therefore, was not subject to the one-year suspension. Finding no error in the trial court's decision, we affirm.

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<sup>1</sup> 75 Pa. C.S. §3802(a)(1). That section provides as follows:

**(Footnote continued on next page...)**

This appeal involves the application of Section 3804 of the Vehicle Code, 75 Pa. C.S. §3804, which contains the penalty provisions for DUI violations.<sup>2</sup> In general, this section requires suspension of operating privileges for 12 months when a licensee is convicted, as in the present case, of an offense under

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**(continued...)**

**(a) General impairment.** (1) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

<sup>2</sup> Section 3804 provides, in pertinent part:

**(e) Suspension of operating privileges upon conviction. –**

(1) The department shall suspend the operating privilege of an individual under paragraph (2) upon receiving a certified record of the individual's conviction of or an adjudication of delinquency for:

(i) an offense under section 3802;

...

(2) Suspension under paragraph (1) shall be in accordance with the following:

(i) Except as provided for in subparagraph (iii), 12 months for an ungraded misdemeanor or misdemeanor of the second degree under this chapter.

...

(iii) There shall be no suspension for an ungraded misdemeanor under section 3802(a) where the person is subject to the penalties provided in subsection (a) and the person has no prior offense.

Section 3802. However, the Legislature carved out an exception to the license suspension provision as the statute goes on to state, “[t]here shall be no suspension for an ungraded misdemeanor under section 3802(a) where the person is subject to the penalties provided in subsection (a) [of Section 3804] and the person has no prior offense.” 75 Pa. C.S. §3804(e)(2)(iii).

The facts are also not in dispute. While operating his vehicle on February 24, 2006, Licensee rear-ended a Philadelphia Water Department truck. The officer who arrived on the scene noted a strong odor of alcohol on Licensee’s breath, his eyes were bloodshot, and he was “thick-tongued” and wobbling. Licensee submitted to blood testing which revealed the remarkably high blood alcohol level of .424 percent<sup>3</sup> and tested positive for marijuana. On June 12, 2007, Licensee appeared before the trial court and entered a negotiated guilty plea to driving under the influence of alcohol and general impairment in violation of Section 3802(a)(1). The parties agreed that Licensee did not have any prior convictions for driving under the influence, and he was later sentenced to three to six days incarceration, a concurrent period of six months probation, drug and alcohol treatment and assessment, as well as fines and costs.

The trial court noted that by entering a plea under Section 3802(a)(1), Licensee should not be subject to the civil penalty imposed by the Department of a

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<sup>3</sup> In his brief to this Court, Licensee claims that his blood alcohol level was actually .242% and that the percentage indicated in the record, .424%, is a typographical error. However, Licensee admits that, either way, he was well above the legal limit for driving in the Commonwealth.

one-year license suspension. Despite the fact that it was repeatedly stated by the trial court and both parties that Licensee was a first-time offender and was entering a guilty plea to violating Section 3802(a)(1), the clerk of courts certified on the Department's DL-21 Form that Licensee was *not* sentenced under Section 3804(a)(1) of the Vehicle Code.<sup>4</sup> It was correctly indicated on that form that Licensee was sentenced to a prison term for his offense. Given this information, the Department determined that Licensee was not entitled to the suspension exemption found in Section 3804(e)(2)(iii) because he was not "subject to the penalties provided" in Section 3804(a)(1). By official notice of suspension mailed March 4, 2008, Licensee was informed by the Department that his driving privilege was suspended for a period of one year pursuant to Section 3804(e)(2)(i).

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<sup>4</sup> 75 Pa. C.S. §3804(a)(1). This section provides:

**(a) General impairment.** – Except as set forth in subsection (b) or (c), an individual who violates section 3802(a) (relating to driving under influence of alcohol or controlled substance) shall be sentenced as follows:

(1) For a first offense, to:

(i) undergo a mandatory minimum term of six months' probation;

(ii) pay a fine of \$300;

(iii) attend an alcohol highway safety school approved by the department; and

(iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 (relating to drug and alcohol assessments) and 3815 (relating to mandatory sentencing).

Licensee appealed the official notice of suspension arguing that because he was convicted under Section 3804(a)(1), and as a first-time offender he met the requirements of the no-suspension exemption under Section 3804(e)(2)(iii), the Department was without authority to suspend his license. Licensee also filed a motion for clarification of the record. On August 31, 2009, the trial court entered an “amended” sentencing order repeating the terms of the original sentence and clarifying that Licensee’s sentence was imposed in accordance with Section 3804(a)(1). The order further directed the clerk of courts to file an amended DL-21 Form to reflect this fact. On October 16, 2009, the trial court entered an opinion and order sustaining Licensee’s appeal and rescinding his license suspension because he was a first-time offender and it was clear that the court’s intention was to sentence him within the purview of Section 3804(a)(1); therefore, he was not subject to the one-year suspension. The Department then appealed to this Court.<sup>5</sup>

On appeal, the Department admits that pursuant to Section 3804(e)(2)(iii), a first-time offender sentenced under Section 3802(a)(1) is exempt from the one-year suspension of his operating privilege. The Department contends that because the penalties contained in Section 3804(a)(1) for that violation do not include incarceration but only probation, a \$300 fine, attendance at an alcohol highway safety school and drug and alcohol assessments and treatment, and

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<sup>5</sup> Our standard of review in a license suspension case is limited to determining whether the trial court’s findings of fact are supported by competent evidence and whether the trial court committed an error of law or an abuse of discretion in reaching its decision. *Marone v. Department of Transportation, Bureau of Driver Licensing*, 990 A.2d 1187 (Pa. Cmwlth. 2010).

Licensee received a prison sentence in addition to all of these conditions, he was not “subject to the penalties provided” in Section 3804(a) and should not be eligible for the exemption.

In a license suspension case, the Department bears the initial burden of establishing a prima facie case that a record of conviction supports a suspension. *Glidden v. Department of Transportation, Bureau of Driver Licensing*, 962 A.2d 19 (Pa. Cmwlth. 2008). The Department cannot meet this initial burden because the trial court made it clear in its amended order that Licensee’s sentence was imposed in accordance with Section 3804(a)(1). In addition, the trial court ordered the clerk of courts to amend Licensee’s DL-21 Form and certify to the Department that he was sentenced pursuant to Section 3804(a)(1). Therefore, the official record reflects that Licensee was subject to the penalties provided in Section 3804(a)(1). Because Licensee was also a first-time offender convicted under the general impairment section, the statute mandates that a license suspension *shall not* be imposed. Being unhappy with the District Attorney’s decision to allow such a plea gives the Department no standing to collaterally attack the trial court’s order effectuating the plea. The Department is carrying out a purely administrative function, and once the trial court order was entered in this case, it had no authority to impose the suspension.<sup>6</sup>

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<sup>6</sup> While not mentioned by the Department, in *Glidden v. Department of Transportation, Bureau of Driver Licensing*, 962 A.2d 19 (Pa. Cmwlth. 2008), we held that evidence supported the Department’s determination that the licensee was not sentenced as a first-time offender driving under the influence of alcohol or a controlled substance (DUI), general impairment, because a 30-day sentence was imposed. Unlike in *Glidden*, the trial court specifically found that Licensee was sentenced under the general impairment provision.

The Department also argues that the suspension exemption was not meant to apply to drivers with a high blood alcohol content or marijuana in their system. However, Licensee was not convicted under Sections 3802(b) or (c), relating to high and highest rates of alcohol, or Section 3802(d), relating to controlled substances. Rather, he pled guilty to violating Section 3802(a)(1), a provision which is specifically covered in the exemption and which does not contain any language regarding specific blood alcohol levels or the presence of controlled substances.

Accordingly, the trial court's order is affirmed.

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DAN PELLEGRINI, JUDGE

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**ORDER**

AND NOW, this 19<sup>th</sup> day of August, 2010, the order of the Court of Common Pleas of Philadelphia County, dated October 16, 2009, is affirmed.

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DAN PELLEGRINI, JUDGE