IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jeffrey McShane, Appellant	:	
v.	:	No. 2141 C.D. 2009
	:	Submitted: March 12, 2010
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: August 25, 2010

Jeffrey McShane (Licensee) appeals an order of the Court of Common Pleas of Allegheny County (trial court) suspending his driver's license for one year for refusing to undergo chemical testing, in violation of Section 1547(b)(1) of the Vehicle Code (Implied Consent Law).[1] We affirm.

On November 4, 2008, 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 May 28, 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 Vincent Abate of the Munhall Borough Police Department testified that on October 20, 2008, at approximately 8:30 p.m., he was dispatched to investigate a "hit and run" involving a silver or gray Pontiac. He spotted a "grayish silver Pontiac" turn the wrong way onto a one way street. Notes of Testimony, 5/28/09, at 5 (N.T. __); Reproduced Record at 5 (R.R. __). Officer Abate stopped the vehicle and found the operator, Licensee, with glassy, bloodshot eyes, slurring his speech, and emitting an odor of alcohol. Licensee failed two field sobriety tests.

At that point, Officer Abate asked Licensee to consent to a blood alcohol test at a nearby hospital, UPMC Braddock. When Licensee hesitated, the officer read Licensee the implied consent form, the DL-26 Form, which contains the warnings mandated by *Department of Transportation, Bureau of Traffic Safety v. O'Connell*, 521 Pa. 242, 555 A.2d 873 (1989). Licensee continued to hesitate and did not definitively respond to the request for a blood test. Accordingly, Office Abate offered Licensee the DL-26 Form for reading and signing. Licensee declined to do so. Officer Abate again reiterated that Licensee's refusal to submit to chemical testing would result in a "more severe penalty." N.T. 13; R.R. 13. The officer testified that Licensee did not consent to the blood test and gave no indication that he did not understand the warnings. Officer Abate deemed Licensee's conduct to be a refusal.

In response, Licensee testified that he thought the field sobriety tests "went very well." N.T. 30; R.R. 30. The officer asked him, "Do you want me to take you to Braddock Hospital now for a blood draw?" *Id.* According to Licensee, he did not hesitate but, rather, answered "not really." N.T. 30, 33; R.R. 30, 33. He asked the officer to make a telephone call and was granted permission. Licensee

testified that Officer Abate then returned with the DL-26 Form; placed the form on the hood of the police car; paraphrased the warnings; and said, "By initialing here you are refusing a blood draw. You will lose your license for one year." N.T. 31; R.R. 31. Licensee stated that he told Officer Abate, "If I need to take a blood draw I will go. I can't lose my license because of my job." *Id.* Officer Abate responded, "No, it's too late for that." *Id.* Licensee testified that he twice stated at this point that he had no problem going for a blood draw. Licensee denied being given the DL-26 Form to read and sign.

On cross-examination, Licensee conceded that he did not respond affirmatively to Officer Abate's request for chemical testing. Licensee also admitted that he had consumed two and one-half 12-ounce cans of beer before the stop.

Licensee presented the testimony of his girlfriend, Dawn Rowe. Rowe testified that she was in the vehicle with Licensee when he was stopped by Officer Abate. She explained that she did not witness most of the exchange between the officer and Licensee because she remained in the car. However, at one point, she stepped out of the car to extinguish her cigarette and heard Licensee say, "I will go if I have to go." N.T. 47; R.R. 47.

The Department recalled Officer Abate as a rebuttal witness, who testified that he "read verbatim word for word" the DL-26 Form warnings. N.T. 41; R.R. 41. He further testified that he did not remember Licensee saying that he would take the blood test if he had to; however, he admitted that it was "possible" that Licensee made such a statement after his initial refusal. *Id.*

The trial court credited Officer Abate's testimony and rejected Licensee's testimony. The trial court held that the Department met its burden of

proving that Licensee refused to submit to a blood test, in spite of being warned of the consequence of refusing the test. 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 contends that the Department did not "meet its burden of proving that [Licensee], after being arrested for DUI, refused chemical testing …." Licensee Brief, Statement of Question Presented, at 5.[3] The

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[2] The issue of whether there was a refusal to submit to chemical testing is a question of law subject to plenary review by this Court. *Mueller v. Department of Transportation, Bureau of Driver Licensing*, 657 A.2d 90, 93 (Pa. Cmwlth. 1995). Our 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." *McCloskey v. Department of Transportation, Bureau of Driver Licensing*, 722 A.2d 1159, 1161 (Pa. Cmwlth. 1999).

[3] At the end of his brief, Licensee questions whether he actually was arrested, noting that Officer Abate allowed him to call his mother on his cellphone. Licensee utterly fails to develop the argument that permission to make this call ended his custodial arrest. In any case, in his Statement of Question Presented, Licensee concedes that he was arrested for DUI.

An arrest does not require a formal statement that a suspect is under arrest. *Commonwealth v. Douglass*, 539 A.2d 412, 419 (Pa. Super. 1988) (citing *Commonwealth v. Daniels*, 455 Pa. 552, 317 A.2d 237 (1974)). Rather, an arrest occurs when, in view of all the circumstances surrounding an incident, a reasonable person would have believed that he was not free to leave. *Brendlin v. California*, 551 U.S. 249, 255 (2007).

Before the trial court, Licensee did not pursue the legal question of whether he was under arrest at all times:

> MR. MIELNICKI [Licensee's counsel]: Objection. He is calling this an arrest scene. That is a conclusion of law. . . . Certainly, you may deem this to be an arrest, but there was never a classic arrest.
>
> * * *
>
> THE COURT: It's probably an arrest, but whether he is not free to leave --
>
> MR. MIELNICKI: That is a legal issue.
>
> THE COURT: Right, right. We are not going to get into that today.
>
> MR. MIELNICKI: Okay.
>
> THE COURT: *Unless you are going to argue something.*

(Footnote continued on the next page . . .)

Department counters that it satisfied its *prima facie* burden of proof with Officer Abate's credited testimony that Licensee did not agree to submit to a blood test.

To sustain a 12-month suspension of a licensee's operating privileges, the Department must establish that the licensee: (1) was arrested by a police officer who had reasonable grounds to believe that the licensee was operating the vehicle 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 refusal would result in a license suspension. *Quick v. Department of Transportation, Bureau of Driver Licensing*, 915 A.2d 1268, 1271 (Pa. Cmwlth. 2007). Any response from a licensee that is less than an unqualified, unequivocal assent to a chemical test constitutes a refusal. *Hudson v. Department of Transportation, Bureau of Driver Licensing,* 830 A.2d 594, 599 (Pa. Cmwlth. 2003). A licensee's refusal need not be expressed in words; a licensee's conduct may constitute a refusal to submit to testing. *Id.* Questions of credibility are for the trial court. *O'Connell*, 521 Pa. at 248, 555 A.2d at 875.

Here, Licensee challenges the trial court's finding that his conduct constituted a refusal to submit to chemical testing. Licensee argues that he never had a meaningful opportunity to comply with the officer's request for chemical testing because the officer did not read the warnings verbatim but, rather, paraphrased them. Licensee also contends that once he understood that his license would be suspended for refusal, he agreed to take the test. The Department replies

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(continued . . .)

N.T. 11; R.R. 11 (emphasis added). In spite of this direct invitation, Licensee did not argue that he was not arrested.

that the evidence credited by the trial court supports neither of Licensee's contentions.

The testimony of Officer Abate and Licensee conflicted on two points. First, Officer Abate testified that he read the warnings verbatim, and Licensee testified that the officer merely paraphrased the warnings. Second, Officer Abate testified that Licensee did not answer any of his requests to submit to a blood test, and Licensee testified that he agreed to the blood test after learning the consequences of refusal. The trial court resolved the conflicts in favor of Officer Abate.[4] Questions of credibility are for the trial court to resolve.[5]

This Court has explained that police officers are not required to try to convince a licensee to submit to testing or to spend time waiting to see if the licensee will eventually change his mind. *Broadbelt v. Department of Transportation, Bureau of Driver Licensing*, 903 A.2d 636, 641 n.7 (Pa. Cmwlth. 2006).[6] Here, the trial court found that Licensee did not change his mind. The

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[4] The trial court found that Officer Abate testified that Licensee said "no" when the officer asked Licensee to go to the hospital for the blood test. This is incorrect. Officer Abate testified that Licensee remained silent:

> Q. How did [Licensee] respond to the request for a consent to a blood test?
>
> A. He was hesitant. I did read the warnings on the PennDOT form.
>
> Q. You say he was hesitant. Did he say anything? Did he not say anything? Was [he] just hesitant in giving an answer?
>
> A. I don't recall. *I don't believe he said anything*.

N.T. 9-10; R.R. 9-10 (emphasis added). However, the trial court's factual finding in this regard is of no moment to the disposition of the case.

[5] *See O'Connell*, 521 Pa. at 248, 555 A.2d at 875 (holding that "[q]uestions of credibility and conflicts in the evidence presented are for the trial court to resolve, not our appellate courts.").

[6] In *Broadbelt*, we concluded that the licensee had a meaningful opportunity to comply with the statute where he failed to affirmatively agree to a blood test after approximately 12 minutes. 903 A.2d at 641. Further, in *Lucas v. Department of Transportation, Bureau of Motor Vehicles*, 854 A.2d 639, 642 (Pa. Cmwlth. 2004), this Court held that "stalling tactics," such as trying to delay

(Footnote continued on the next page . . .)

evidence in the record supports this finding because Officer Abate specifically testified that even after he warned Licensee for the second time that the penalty for refusal would be severe, Licensee "still didn't want to take the test." N.T. 14; R.R. 14. This Court must accept the fact finding of the trial court. *O'Connell*, 521 Pa. at 248, 555 A.2d at 875.

In sum, Licensee had an opportunity to comply with the request for chemical testing, but he forfeited this opportunity by not answering the officer's requests in a reasonable and prompt manner. Accordingly, we affirm the trial court.

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MARY HANNAH LEAVITT, Judge

(continued . . .)

chemical testing by engaging in a long discussion with the officer, constitute a refusal to consent to chemical testing.

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O R D E R

AND NOW, this 25th day of August, 2010, the order of Court of Common Pleas of Allegheny County dated September 29, 2009, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge