

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Courtney A. McClintock	:	
	:	
v.	:	Nos. 236 and 237 C.D. 2011
	:	SUBMITTED: July 22, 2011
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge
 HONORABLE ROBERT SIMPSON, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: October 28, 2011**

The Department of Transportation, Bureau of Driver Licensing (Bureau) appeals from the orders of the Court of Common Pleas of Indiana County (trial court) regarding the consolidated statutory appeals of Courtney A. McClintock (McClintock) from 90-day and one-year suspensions of her operating privileges.

McClintock was arrested and issued a citation on October 23, 2009, by Indiana University of Pennsylvania Police for violating Section 6308 of the Crimes Code, *as amended*, 18 Pa. C.S. §6308 (relating to purchase, consumption, possession or transportation of liquor or malt or brewed beverages). Reproduced Record (R.R.) at 20a. At the time, McClintock was 19 years old, with a date of birth of July 16, 1990. *Id.* at 50a. On January 20, 2010, McClintock accepted

admission into the Accelerated Rehabilitative Disposition Summary Program (ARD) for a period of 90 days.¹ On January 22, 2010, pursuant to Section 6310.4(a) of the Crimes Code, 18 Pa. C.S. § 6310.4(a), the Magisterial District Justice certified to the Bureau that McClintock had been admitted into ARD and ordered her operating privileges suspended.² While still a participant of the ARD program, McClintock was arrested on February 9, 2010, and once again cited for underage drinking under Section 6308. Thereafter, by letter dated March 2, 2010, McClintock requested that she be allowed to voluntarily withdraw from the ARD program and that the matter be remanded to the District Court for disposition of the underlying charges. The Bureau's notice of suspension, with a mail date of March 3, 2010, informed McClintock that as a result of her October 23, 2009 violation for underage drinking, her operating privilege was being suspended for a period of 90 days pursuant to Section 1532(d)(1) of the Vehicle Code, *as amended*, 75 Pa. C.S.

¹ In *Lihota v. Department of Transportation, Bureau of Driver Licensing*, 811 A.2d 1117, 1118 n.2 (Pa. Cmwlth. 2002), this court explained:

The Accelerated Rehabilitative Disposition program is a special pre-trial intervention program for non-violent offenders who have a limited or no prior record. The A.R.D. program takes a "rehabilitative" stance instead of a punitive one. The purpose of A.R.D. is to determine, at an early stage, defendants who will respond to the treatment and education and, therefore, decrease their chance of future incidents of the same nature. A.R.D. is completely voluntary and the defendant must ask to be accepted into the program. Pa. R.Crim. P. 313(A).

² Section 6310.4(a) of the Crimes Code provides that whenever a person is convicted, or is adjudicated delinquent or is admitted to any preadjudication program for violating, *inter alia*, section 6308 of the Crimes Code, the court shall order the operating privileges of the person suspended, and the court shall transmit a copy of the order to DOT.

§1532(d)(1), effective April 7, 2010.³ McClintock filed a statutory appeal of her suspension on March 23, 2010.

In the meantime, McClintock's second violation of Section 6308 which occurred on February 9, 2010, resulted in her conviction on March 16, 2010. On that same date, the Bureau was sent the certified report of McClintock's conviction for underage drinking. Thereafter, by notice with a mail date of May 12, 2010, the Bureau suspended McClintock's operating privileges for one year pursuant to Section 1532(d)(2) of the Vehicle Code, effective June 16, 2010, for her conviction of her second offense. McClintock timely appealed, arguing that her withdrawal from ARD following her first violation of underage drinking nullified her acceptance and that since the Commonwealth later withdrew the underlying October 23, 2009 charge of underage drinking, there was no violation to support the 90 day suspension imposed by the Bureau. McClintock further argued that consequently, her March 16, 2010 conviction for her second underage drinking violation would now be considered her first offense for suspension purposes (rather than her second offense), and therefore, she should only receive a 90 day suspension, rather than the one year suspension imposed by the Bureau.

Following a hearing *de novo*, the trial court agreed with McClintock and sustained her appeal from the 90 day suspension imposed for her first underage drinking violation which occurred on October 23, 2009. Relying on this court's decisions in *Ryan v. Department of Transportation, Bureau of Driver Licensing*, 946 A.2d 191 (Pa. Cmwlth. 2008); *Kolva v. Department of Transportation, Bureau*

³ On this same date, the Commonwealth withdrew the charge of underage drinking McClintock had been cited for on October 23, 2009. A notation on the citation states: "This officer withdraws this citation on 4/7/10." R.R. at 20a.

of Driver Licensing, 977 A.2d 1248 (Pa. Cmwlth. 2009), *app. den.*, 605 Pa. 703, 990 A.2d 731 (2010); and *Poborski v. Department of Transportation, Bureau of Driver Licensing*, 964 A.2d 66 (Pa. Cmwlth. 2009), the trial court concluded that while the Bureau’s suspension “was valid when it was made . . . the Defendant’s acceptance of ARD was nullified by her voluntary withdrawal from the program.” Opinion and Order of Court, January 12, 2011, at 1-2. The trial court further ordered that McClintock’s record be corrected to indicate that she had been convicted of only one underage drinking offense for suspension purposes and remanded the matter to the Bureau to impose the corrected suspension of ninety (90) days.

On appeal, the Bureau presents a single issue of whether the trial court erred as a matter of law in holding that McClintock’s acceptance of ARD was vitiated by her request for withdrawal from ARD forty-one days after she had been accepted. The Bureau argues that the trial court disregarded the clear language of the statute requiring it to impose a 90 day suspension “upon receiving a certified record of the driver’s . . . *admission into a preadjudication program* for a violation under . . . 6308” 75 Pa. C.S. §1532(d)(1) (emphasis added). The Bureau argues that *Ryan* is distinguishable, in that the licensee therein was granted permission to withdraw from ARD and had the underage drinking charges against him *nolle prossed* on the same day, just 29 days after he had been admitted to the ARD program, and one month before the Bureau subsequently sent his license suspension notice. The Bureau argues that in the case *sub judice*, McClintock had been a participant in the ARD program for 41 days before she sought to withdraw, which was beyond the 30 day appeal period provided for by Pa. R.Crim. P. 460, and that while still a participant of ARD, she violated the underage drinking

provision for a second time on February 9, 2010, shortly after being accepted into the program. The Bureau avers that while the 90 day suspension notice had a mail date of March 3, 2010, it was actually mailed on February 24, 2010, which is the processing date on the notice, and that it was more than likely received by Licensee no later than March 2, 2010, which, coincidentally, was the date she requested to withdraw from the ARD program.⁴ The Bureau further contends that McClintock received the suspension notice more than a month before the charge of underage drinking was withdrawn by the Commonwealth on April 7, 2010. The Bureau also points out that McClintock pled guilty to her second underage drinking citation on March 16, 2010, which also occurred before the first underage drinking charges were withdrawn. In contrast, the licensee in *Ryan* had no subsequent citations or convictions while still a participant of ARD and his suspension notice was sent a month after the court allowed him to withdraw from ARD and dismissed with prejudice the citation for underage drinking after the Commonwealth withdrew the charge against him.

Finally, the Bureau believes that both *Kolva* and *Poborski* are distinguishable because both of those cases involved whether a commercial driver who was admitted into ARD for a DUI violation, who then was permitted to withdraw voluntarily from ARD, was still subject to disqualification of his commercial driving privilege pursuant to 75 Pa. C.S. §1611(a)(relating to disqualification for first violation of certain offenses). The Bureau argues that in those cases, this court held that there was no conviction as that term is defined in

⁴ In its brief, the Bureau explained that, “[t]he reason [it] assigns a ‘Mail Date’ that is a week later than the ‘Processing Date’ is to ensure that a licensee who receives a notice of suspension will have a full 30 days in which to file a timely appeal to a court of common pleas.” Appellant’s Brief, p. 11 n.1.

Section 1603 of the Vehicle Code and therefore, the disqualification could not stand. Neither of these cases, the Bureau asserts, support the trial court's rationale herein. We disagree.

Section 1532(d) of the Vehicle Code, relating to the suspension of operating privilege, provides in part:

The department shall suspend the operating privilege of any person upon receiving a certified record of the driver's conviction, adjudication of delinquency or admission into a preadjudication program for a violation under 18 Pa. C.S. §6307 (relating to misrepresentation of age to secure liquor or malt or brewed beverages), 6308 (relating to purchase, consumption, possession or transportation of liquor or malt or brewed beverages) or 6310.3 (relating to carrying a false identification card). The duration of the suspension shall be as follows:

- (1) For a first offense, the department shall impose a suspension for a period of 90 days.
- (2) For a second offense, the department shall impose a suspension for a period of one year.

75 Pa. C.S. §1532(d). *Kolva v. Department of Transportation, Bureau of Driver Licensing*, 977 A.2d 1248 (Pa. Cmwlth. 2009), *app. den.*, 605 Pa. 703, 990 A.2d 731 (2010), concerned a driver who was originally charged with violating Section 3802(a)(1) of the Vehicle Code, *as amended*, 75 Pa. C.S. §3802(a)(1) (DUI), who later withdrew from ARD and then pled guilty to recklessly endangering another person and had the DUI charge against him dismissed. In that case, we concluded that like the driver in *Poborski*, Kolva's voluntary withdrawal from ARD nullified his acceptance. We were careful to distinguish *Lihota* and those cases wherein the driver had not taken action to nullify his or her acceptance of ARD, as had the

licensees in both *Poborski* and *Ryan*.⁵ We noted that “a licensee’s mere acceptance of ARD is sufficient to trigger a suspension, *see [Dep’t. of Transp.], Bureau of Driver Licensing v. McDevitt* . . . and that DOT’s initial suspension or disqualification is proper when based upon an acceptance of ARD.” *Kolva*, 977 A.2d 1248, 1253 (Pa. Cmwlth. 2009). The court further stated, however:

[A] licensee’s acceptance of ARD represented a conscious choice to seek an alternative to prosecution and to waive the right to prove one’s innocence or risk conviction, but when the trial court grants a petition to withdraw from ARD that decision constitutes a nullification of the licensee’s knowing waiver of the right to challenge the underlying charge and by extension a nullification of his acceptance of ARD.

Id.

Consequently, when McClintock accepted ARD for her first underage drinking violation and was admitted into the preadjudication program, which acceptance was certified to the Department, it was authorized to suspend her operating privilege for a period of 90 days. 75 Pa. C.S. §1532(d)(1). However, once the trial court allowed McClintock to withdraw from the ARD program, presumably when the charges were withdrawn by the Commonwealth on April 7, 2010, there was no longer any basis for the Bureau to enforce McClintock’s 90 day suspension.

⁵ *See Smay v. Dep’t. of Transp., Bureau of Driver Licensing*, 940 A.2d 540 (Pa. Cmwlth. 2007)(wherein the minor completed alcohol counseling classes, the functional equivalent of preadjudication disposition, and subsequently was found not guilty of the underlying criminal charge, suspension upheld because it was triggered by admission into the alcohol classes); *Levinson v. Dep’t. of Transp., Bureau of Driver Licensing*, 926 A.2d 1284 (Pa. Cmwlth. 2007)(where licensee completed ARD and the underlying charges were subsequently dismissed, ARD acceptance supported suspension under Section 1532).

Accordingly, based upon all of the foregoing facts and the applicable law, Licensee having only been convicted of one violation of Section 6308 for underage drinking, she is subject to a 90 day suspension as provided under Section 1532(d)(1) of the Vehicle Code. For this reason, the trial court is affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge

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 Appellant :

ORDER

AND NOW, this 28th day of October, 2011, the orders of the Court of Common Pleas of Indiana County in the above-captioned matter are hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge