IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Susan G. Talbot	:	
	:	
v.	:	
	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	No. 2386 C.D. 2009
Appellant	:	Submitted: June 4, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: July 1, 2010

The Pennsylvania Department of Transportation, Bureau of Driver Licensing (Department) appeals an order of the Court of Common Pleas of Bucks County (trial court) sustaining the appeal of Susan G. Talbot (Licensee) and rescinding the Department's one-year suspension of her driving privilege pursuant to Section 1547(b)(1)(i) of the Vehicle Code.[1] Because the trial court erred in determining that Licensee did not refuse to submit to chemical testing, we reverse.

[1] 75 Pa. C.S. §1547(b)(1)(i). That section provides, in pertinent part:

> (1) If any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer,

(Footnote continued on next page…)

On April 3, 2009, Licensee was arrested by Officer Gregory Rupar (Officer Rupar) of the Newtown Township Police Department for driving under the influence of alcohol. By official notice, the Department informed Licensee that her operating privilege was suspended for one year pursuant to Section 1547(b)(1)(i) of the Vehicle Code because of her reported refusal to submit to chemical testing. Licensee appealed to the trial court. Both parties agreed that Licensee was driving under the influence of alcohol and that Licensee never verbally refused to submit to a blood test. Therefore, the sole issue before the court was whether Licensee's conduct constituted a refusal.

At the hearing, Officer Daniel Bartle (Officer Bartle) was the sole witness for the Department. He testified that he was Officer Rupar's field training officer at the time of the incident and that he assisted Officer Rupar in Licensee's traffic stop. He witnessed Officer Rupar administer two field sobriety tests – the nine-step walk and turn and the one-legged stance – both of which Licensee failed. Officer Bartle then administered a breath test to Licensee, which had a positive reading for alcohol of .17%. At that time, Officer Rupar took Licensee into custody and Officer Bartle accompanied them to St. Mary Medical Center for the purpose of obtaining a blood alcohol test.

(continued…)

> the department shall suspend the operating privilege of the person as follows:
>
> (i) Except as set forth in subparagraph (ii), for a period of 12 months.

Officer Bartle testified that while at the hospital, Officer Rupar made several attempts to read Licensee the implied consent warnings found on the Department's form DL-26, but Licensee repeatedly interrupted him with statements about losing her license and her job. Officer Rupar asked her to hold her statements and questions until he was finished reading the warnings, but Licensee continued to interrupt him. Officer Bartle testified that Officer Rupar eventually read Licensee the entire implied consent warnings and then asked Licensee if she would submit to a blood sample. Licensee did not give a yes or no answer but continued to make statements about losing her job. Officer Bartle then intervened and asked Licensee if she understood the warnings, to which she answered yes and that she had been charged with a previous DUI in 2006. He then asked if she was going to submit to the chemical test, but she did not respond. He testified that he then told Licensee that if she did not give a response, it would be deemed a refusal. Licensee did not provide an answer, and Officer Bartle deemed the non response as a refusal. He asked Licensee to stand up and turn around but she refused and said no, so the officers restrained her for transport to police headquarters. He testified that this exchange in the hospital lasted approximately four minutes.

When they were in the hospital parking lot, Officer Bartle testified that Officer Rupar informed him that Licensee wanted to go back inside and submit to the blood test but he stated "that's not what we are going to do." (Reproduced Record (R.R.) at 19a.) He testified that Officer Rupar informed him again when they had Licensee back at police headquarters that she wanted to return to the hospital for the blood test. He also admitted that Licensee called the station

the next morning and informed them that she had her blood drawn at the hospital after being released from police custody.

Licensee testified that she was "pretty intoxicated" on the night in question, she had consumed "big glasses" of red wine and should not have been driving. (R.R. at 33a.) She entered a guilty plea to the criminal charge of driving under the influence of alcohol stemming from this incident. Licensee admitted that she interrupted Officer Rupar several times while he was trying to read her the implied consent warnings at the hospital, but she was very nervous about losing her job and all she wanted to know was the consequences for a second DUI. She admitted that Officer Bartle asked her if she was going to take the test and she did not give a yes or no answer; rather, she responded that she just wanted someone to tell her the consequences for receiving a second DUI. She stated that Officer Bartle became very frustrated with her and asked her to stand up, but she said no because she allegedly wanted to submit to the blood test. At that time, Officer Bartle put her up against the wall and she was escorted out of the hospital and into Officer Rupar's vehicle. While in the vehicle, Licensee claims she asked if she could go back into the hospital to have her blood drawn but Officer Rupar allegedly said, "No, you missed your window of opportunity." (R.R. at 39a.) Licensee then told him she was going to return to the hospital and get her blood drawn on her own. Upon being released from police custody, Licensee allegedly asked Officer Rupar to take her back to the hospital, but he refused and dropped her off at her home instead. Licensee then returned to the hospital, had her blood drawn, and called Officer Rupar the next morning and informed him of this fact.

The trial court sustained the appeal finding that because Licensee never verbally refused to submit to blood testing, her conduct, taken as a whole, did not constitute a refusal. In support of this conclusion, the trial court pointed to the fact that the entire exchange lasted only approximately four minutes; Licensee was never told that her questions were irrelevant; she was cooperative during every other stage of the investigation; she asked several times to return to the hospital for testing; and she later voluntarily submitted to private testing knowing that such evidence would be used to convict her. The trial court stated that Licensee's inquiries regarding the consequences of being charged with a second DUI offense "were not designed to be dilatory or obstructionist," and any brief delay they caused did not constitute a refusal for purposes of Section 1547(b) of the Vehicle Code. The Department took this appeal[2] contending that the trial court erred in finding that Licensee did not refuse the requests of Officers Bartle and Rupar to submit to chemical testing.[3] We agree.

[2] Our scope of review is limited to determining whether the trial court committed an error of law or an abuse of discretion, and whether the trial court's findings are supported by substantial evidence. *Gregro v. Department of Transportation, Bureau of Driver Licensing*, 987 A.2d 1264 (Pa. Cmwlth. 2010).

[3] In order to sustain a license suspension for refusal to submit to chemical testing pursuant to Section 1547 of the Vehicle Code, the Department must prove that the driver was arrested for driving under the influence of alcohol; was asked to submit to chemical testing; refused to submit to that testing; and was specifically warned that a refusal would result in the revocation of his or her driving privilege. *Ostermeyer v. Department of Transportation, Bureau of Driver Licensing*, 703 A.2d 1075 (Pa. Cmwlth. 1997). Whether a licensee has refused chemical testing is a question of law to be determined based upon the facts found by the trial court. *Hudson v. Department of Transportation, Bureau of Driver Licensing*, 830 A.2d 594 (Pa. Cmwlth. 2003).

Pennsylvania courts have repeatedly held that anything less than an unqualified, unequivocal assent to submit to chemical testing constitutes a refusal. *Finney v. Department of Transportation, Bureau of Driver Licensing*, 721 A.2d 420 (Pa. Cmwlth. 1998); *Department of Transportation v. Renwick*, 543 Pa. 122, 669 A.2d 934 (1996). In addition, a refusal does not have to be expressed in words; it can be implied from a licensee's conduct. *Finney*, 721 A.2d at 423. In this case, Licensee admits that while she was in the hospital, she never verbally agreed to the chemical testing despite being asked several times by the officers and having received her *O'Connell* and implied consent warnings; she repeatedly interrupted the officers; refused to answer their questions; and continued to make statements about possibly losing her job. When Officer Rupar told her point blank that she needed to give a yes or no answer and that failure to give a response would be deemed a refusal, Licensee admits that she did not give an appropriate response, instead continuing to interrupt with comments and inquiries.[4] *See Renwick*, 543 Pa. at 131, 669 A.2d at 939 (holding that licensee who closed her eyes, turned her head, and ignored several requests to submit to testing refused to submit); *Hudson*, 830 A.2d at 600 (holding that licensee who repeatedly interrupted officers trying to administer warnings and who caused an altercation requiring him to be restrained refused to submit); *McCloskey v. Department of Transportation, Bureau of Driver*

[4] Officers Bartle and Rupar's sole responsibility was to give Licensee the implied consent warnings, *Martinovic v. Department of Transportation, Bureau of Driver Licensing*, 881 A.2d 30, 35 (Pa. Cmwlth. 2005), which Licensee does not dispute occurred. *See also Department of Transportation, Bureau of Driver Licensing v. Scott*, 546 Pa. 241, 254, 684 A.2d 539, 546 (1996) (stating "[o]nce an officer provides *O'Connell* warnings to a motorist, the officer has done all that is legally required to ensure that the motorist has been fully advised of the consequences of refusing to submit to chemical testing.") While Licensee may have been concerned with the consequences of receiving her second DUI, she was not entitled to any additional information on such consequences prior to deciding whether to submit to chemical testing.

Licensing, 722 A.2d 1159 (Pa. Cmwlth. 1999) (holding that licensee who repeatedly asked for his implied consent warnings to be reiterated and refused to make a decision on whether or not to submit to testing for approximately eight minutes was stalling and refused to submit). Moreover, this refusal is not vitiated because she offered to submit to testing after she left the hospital or at police headquarters or having the test taken after she was released from custody; she had to give her unqualified assent when asked. *Broadbelt v. Department of Transportation*, 903 A.2d 636, 641 n.7 (Pa. Cmwlth. 2006); *Department of Transportation, Bureau of Driver Licensing v. Smith*, 539 A.2d 22, 23 (Pa. Cmwlth. 1988).

Because she did not give an unqualified, unequivocal assent to submit to chemical testing, Licensee's conduct constituted a refusal. Accordingly, the trial court's order is reversed.

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DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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O R D E R

AND NOW, this 1st day of July, 2010, the order of the Court of Common Pleas of Bucks County, dated November 6, 2009, is reversed, and the case is remanded for the trial court to enter an order dismissing the suspension appeal.

Jurisdiction relinquished.

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DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Susan G. Talbot	:	
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	:	Submitted: June 4, 2010
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE FRIEDMAN FILED: July 1, 2010

I respectfully dissent. The majority reverses the decision of the Court of Common Pleas of Bucks County (trial court), which held that the Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (DOT) failed to meet its burden of proving that Susan G. Talbot's (Licensee) conduct constituted a refusal to submit to chemical testing. Unlike the majority, I would affirm.

In April 2010, Licensee was driving under the influence of alcohol (DUI) when a police officer stopped her car. After arresting Licensee, the officer took her to a local hospital for a blood test. The officer attempted to read Licensee the implied consent warnings, but Licensee was very upset, was crying, and she had a question about the suspension of her driving privileges because this would be her second DUI offense. Licensee tried to ask her question, but the officer would

not acknowledge or address it. Instead, the officer told Licensee to hold her question until he finished reading the warnings.

After the officer completed the warnings, Licensee asked her question, but the officer still would not provide an answer. The officer asked his own question, whether Licensee would submit to a blood test. Licensee had no intent to refuse to submit to a blood test, but, because the officer had finished reading the warnings, Licensee expected the officer to answer her question first. Licensee credibly testified, "I just wanted somebody to answer my question." (N.T. at 25, R.R. at 38a.) The officer became frustrated and asked Licensee to get up. Licensee said "no" because she knew the consequences of a refusal and wanted to stay at the hospital for a blood test. The officer then stood Licensee up against the wall, handcuffed her and removed her from the hospital. The entire episode lasted no more than four minutes.

In the parking lot of the hospital, Licensee said, "Can you take me back into the hospital? I want to get my blood drawn." (N.T. at 25, R.R. at 38a.) The officer said, "No, you missed your window of opportunity." (N.T. at 25-26, R.R. at 38a-39a.) Licensee said, "I am going back and get my blood drawn as soon as all this is done…. I have never refused. You have never heard me refuse at all, and I want to go in and give my blood." (N.T. at 26, R.R. at 39a.) Later, Licensee returned to the hospital for the blood test, which the police used to convict her of DUI.

DOT suspended Licensee's operating privileges for refusing to submit to the blood test, and Licensee filed an appeal. The trial court sustained her appeal, giving this explanation.

> I was a prosecutor, as you know, for 25 years. I understand the need of a police officer to get back on the street. I understand dealing with drunk drivers. And some of them are horrifically drunk and some are being mouthy and belligerent and some are being down right mean and obnoxious.
>
> But there is a fine line you have to draw between giving somebody an opportunity … to understand what's happening and give them a right to refuse versus getting jerked around by somebody who is playing games with you all night.
>
> I understand you have other things to do than draw people's blood…. She never refused, she immediately says that she will take the test when she realizes beyond any doubt nobody is answering whatever question it is that she is asking….
>
> So based on all those circumstances, there is a line, and I think the line in this case is in her favor. So the appeal is sustained.

(N.T. at 38-39, R.R. at 51a-52a.) In its opinion, the trial court further explained as follows:

> That [Licensee] continued to inquire [after the officer finished reading the warnings] was a function of [the officer's] instruction to "hold" her statements and questions to the end and the failure of either officer to address her questions and concerns[,] rather than [being] evidence of an intent to refuse or a desire to be uncooperative. Any evidence that could be drawn from [Licensee's] conduct that would support the conclusion sought by [DOT] was far outweighed by evidence of

> [her] willingness to comply and cooperate[,] including her complete cooperation during every other stage of the investigation, her unwillingness to leave the hospital in an attempt to persuade the officer[] to allow her to submit to testing, her voluntary submission to private testing and her notification of the police department that test results were available knowing that such evidence would be used to convict her.

(Trial ct. op. at 4-5.) Thus, the trial court found that, as a matter of fact, Licensee did not refuse to submit to a blood test. In addition, the trial court relied on *Armstrong v. Department of Transportation, Bureau of Driver Licensing*, 695 A.2d 930 (Pa. Cmwlth. 1997), and *McDonald v. Department of Transportation, Bureau of Driver Licensing*, 708 A.2d 154 (Pa. Cmwlth. 1998), to conclude that, as a matter of law, Licensee did not refuse to submit to a blood test.

I find no error in the trial court's decision. In *Armstrong*, this court held that a licensee has not made a knowing and conscious refusal to submit to chemical testing where circumstances have created confusion in the mind of the licensee. In *McDonald*, this court held that it is not a refusal where a licensee delays a decision to submit to chemical testing because of confusion. Here, the trial court found that the officer's instruction to Licensee to "hold" her questions until he finished reading the warnings led Licensee to believe that the officer would answer her questions once he completed the warnings. The trial court, as factfinder, credited Licensee's version of the events and found that Licensee only delayed giving her assent to the blood test because the officer's broken promise confused her. *Cf. McCloskey v. Department of Transportation, Bureau of Driver Licensing*, 722 A.2d 1159 (Pa. Cmwlth. 1999) (distinguishing *McDonald* because, in *McCloskey*, the trial court found as a fact that the licensee was not confused).

Accordingly, I would affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge