IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph J. Rudisill	:	
	:	
v.	:	No. 2475 C.D. 2010
	:	
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,	:	Submitted: May 20, 2011
Appellant	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: August 10, 2011**

The Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (Department) appeals from the Order of the Court of Common Pleas of Philadelphia County (trial court), which sustained the appeal of Joseph J. Rudisill (Licensee) of a one-year suspension of his driver's license privileges. The Department argues that the trial court erred in sustaining the appeal because Licensee had been accepted into an Accelerated Rehabilitative Disposition (ARD) program within ten years of his current conviction and, thus, qualified as a repeat offender within the ten year look-back period set forth in

Section 3806(b) of the Vehicle Code (Code), 75 Pa. C.S. § 3806, which mandates a one year license suspension for such offenders.[1]

Licensee argues that the date he was accepted into ARD by the district attorney is the date of "acceptance" under the Code, and the Department did not prove when that event occurred here. The Department contends that the date of acceptance is the date reported to the Department by the Clerk of Courts, which is the date of the hearing at which the trial court accepts the district attorney's recommendation of ARD. Because Licensee waived his argument, and we agree with the Department that it is the date of the trial court's determination that constitutes a defendant's acceptance into an ARD program for purposes of the Code, we must reverse.

On April 13, 2000, Licensee was arrested and charged with driving under the influence of alcohol or controlled substances (DUI). (Certified Driving History at 3, R.R. at 32a.) On September 15, 2000, Licensee was accepted, by the trial court, into the ARD program. (Hr'g Tr. at 2, R.R. at 13a.) On May 8, 2010, Licensee was arrested for and charged with DUI in New Jersey and convicted in New Jersey on July 27, 2010. (Hr'g Tr. at 2, R.R. at 13a.) On August 24, 2010, pursuant to Section 3806(b) of the Code, the Department sent an official notice of suspension to Licensee stating that his license was suspended for one year because he had been accepted into the ARD program

[1] Section 3806(b) states, in relevant part, that the "calculation of prior offenses . . . shall include . . . acceptance of [ARD] . . . within the ten years before the present violation occurred." 75 Pa. C.S. § 3806(b).

within ten years of his May 8, 2010 violation. (Official Notice of Suspension at 1, R.R. at 6a.)

Licensee filed an appeal from the suspension of his driver's license and, on October 29, 2010, the trial court held a hearing. (Hr'g Tr. at 1-2, R.R. at 12a-13a.) At the hearing, the Department introduced Licensee's certified driving record as evidence of the following facts. Licensee's driving record reflected that he "was convicted in New Jersey on July 27, 2010 for a May 8, 2010 violation of driving while intoxicated." (Hr'g Tr. at 2, R.R. at 13a; Certification and Attestation, Ex. C1 at 1, R.R. at 20a.) The Department also established that Licensee had a prior DUI offense on April 13, 2000 and the date of his ARD acceptance for this offense was September 15, 2000, which was within ten years of Licensee's present violation. (Hr'g Tr. at 2, R.R. at 13a; Certification and Attestation, Ex. C1 at 1, R.R. at 20a; see also Report of the Clerk of Courts at 1, R.R. at 28a (stating the date of Licensee's ARD was September 15, 2000).) Thus, Licensee's certified driving record supported the suspension of Licensee's driver's license for one year pursuant to Section 3804(e)(2) of the Code, 75 Pa. Code § 3804(e)(2). (Hr'g Tr. at 2-3, R.R. at 13a-14a.) Accordingly, the Department satisfied its burden of proof, and the burden shifted to Licensee to prove by clear and convincing evidence that the convictions did not occur. Licensee did not dispute that he had two DUIs, but argued that the ten year look-back period should be measured back to the date of his first offense on April 13, 2000, rather than the date of his ARD acceptance for that offense. (Hr'g Tr. at 3-6, R.R. at 14a-17a.)

In determining whether to sustain Licensee's appeal, the trial court considered whether Licensee's "ARD offense count[ed] as a prior offense for purposes of imposing a [12 month] suspension," (Hr'g Tr. at 3, R.R. at 14a), of his driver's license under Section 3806 of the Code as a result of Licensee's most recent DUI offense in New Jersey. (Hr'g Tr. at 3, R.R. at 14a.) Although the trial court found that Section 3806(b) of the Code mandated a suspension because the Code "calculates from 'preliminary disposition' of the first matter to the 'present violation,'" (Trial Ct. Op. at 2), the trial court did not suspend Licensee's driver's license. Instead, the trial court concluded that, because Licensee "has no other offenses calculable under Section 3806," the calculation would make Licensee's "suspension seem more punitive than merely compliant with the intent of the law," so his license should not be suspended. (Trial Ct. Op. at 3.) In doing so, the trial court disagreed with the "letter of the law," (Trial Ct. Op. at 3), position of the majority opinion in Dick v. Department of Transportation, Bureau of Driver Licensing, 3 A.3d 703 (Pa. Cmwlth. 2010), finding the dissenting opinion more persuasive in its efforts at "'avoid[ing] an absurd and harsh result.'" (Trial Ct. Op. at 3 (quoting Dick, 3 A.3d at 712 (Kelley, J., dissenting) (quoting Secretary of Revenue v. John's Vending Corporation, 453 Pa. 488, 494, 309 A.2d 358, 362 (1973)).) The Department now appeals the trial court's Order to this Court.[2]

Section 3804(e) of the Code[3] generally requires the Department to issue a license suspension to any licensee convicted of DUI. 75 Pa. C.S. § 3804(e).

[2] "Our review is limited to determining whether the trial court committed an error of law or an abuse of discretion, and whether its findings of facts were supported by substantial evidence." Dick, 3 A.3d at 706 n.4.

[3] Section 3804(e) states, in relevant part:

"Once [the Department] introduces certified conviction records showing that a licensee's record merits a suspension, it has established a prima facie case and the burden shifts to the licensee, who must then prove by clear and convincing evidence that the conviction did not occur." Dick, 3 A.3d at 707. Clear and convincing evidence is defined as "evidence that is so clear and direct as to permit the trier of fact to reach a clear conviction, without hesitancy, as to the truth of the facts at issue." Mateskovich v. Department of Transportation, Bureau of Driver Licensing, 755 A.2d 100, 103 n.1, (Pa. Cmwlth. 2000) (quoting Sharon Steel Corporation v. Workmen's Compensation Appeal Board (Myers), 670 A.2d 1194, 1199 (Pa. Cmwlth.1996)).

> (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*; or
>
> (ii) an offense which is substantially similar to an offense enumerated in section 3802 reported to the department under Article III of the compact in section 1581 (relating to Driver's License Compact).
>
> (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*.

75 Pa. C.S. § 3804(e) (emphasis added). Section 3804(e)(2)(iii) provides an exception from license suspension for those licensees who do not have a prior offense. 75 Pa. C.S. § 3804(e)(2)(iii). Section 3806(b) essentially defines what a prior offense is for the purpose of the exception set forth in Section 3804(e)(2)(iii). 75 Pa. C.S. § 3806(b).

On appeal, the Department argues that Section 3806 of the Vehicle Code and this Court's holding in Dick require a one year suspension of Licensee's driver's license. In Dick, this Court held that the language of the Code is clear and that the ten year look-back period runs from the date of the second violation to the date of the first adjudication, regardless of when the first violation occurred, per the plain language of Section 3806 of the Code. Dick, 3 A.3d at 708-09. The trial court in this case held that applying the result in Dick was unfair. (Trial Ct. Op. at 3.) However, because Dick is binding precedent of this Court, the trial court erred as a matter of law in failing to follow the majority in Dick. We note that Licensee does not argue that the trial court's opinion should be affirmed on the trial court's rationale, which relied on the dissenting opinion in Dick. Instead, Licensee now argues that the trial court should be affirmed on other grounds. Licensee argues that the date of ARD acceptance referred to in Section 3806(b) should be the date on which the district attorney accepts a licensee into the ARD program and not the date of the ARD placement hearing. Licensee asserts that: (1) there is a distinction between the date of acceptance into ARD by the district attorney and the ARD placement hearing, the date cited by the trial court and relied upon by the Department in this matter; (2) the sole purpose of the placement hearing is to ensure the applicant entering the program understands what acceptance and completion of the program means, but that the applicant is truly accepted into the program prior to the hearing; and (3) a trial court has no authority to accept or reject the district attorney's acceptance of an applicant into ARD—such a determination is at the sole discretion of the district attorney. In this case, Licensee argues that, because the Department did not present evidence of the date on which the district attorney notified Licensee that

he was accepted into the ARD program, the Department did not meet its burden of proving that his acceptance of ARD was "within the ten years before the present violation occurred." 75 Pa. C.S. § 3806(b).

Licensee did not argue to the trial court that the date of ARD acceptance referred to in Section 3806(b) should be the date on which the district attorney accepts a licensee into the ARD program and, therefore, this argument is waived. Rule 302(a) of the Pennsylvania Rules of Appellate Procedure provides that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa. R.A.P. 302(a). "[A]n issue is not reviewable on appeal unless raised or preserved below." Pa. R.A.P. 2119(e). Appellate courts "may raise the issue of waiver sua sponte." Commonwealth v. Edmondson, 553 Pa. 160, 163 n.7, 718 A.2d 751, 752 n.7 (1998).[4] Requiring arguments to be presented to the trial court ensures that the court will have the opportunity to establish a complete record, Commonwealth v. Mitchell, 464 Pa. 117, 124, 346 A.2d 48, 53 (1975), and "eliminates the possibility that the appellate court will be required to expend time and energy reviewing points on which no trial ruling has been made." Edmondson, 553 Pa. at 164, 718 A.2d at 753.

Moreover, had Licensee raised this argument below and preserved it for appeal, we would not agree that the date of acceptance into an ARD program is, for purposes of Section 3806(b) of the Code, the date on which the district attorney accepts the licensee into the program. This Court has not previously

[4] "It is irrelevant that [the Department] did not argue in this appeal that the issue was not preserved." McGaffin v. Workers' Compensation Appeal Board (Manatron, Inc.), 903 A.2d 94, 102 n.14 (Pa. Cmwlth. 2006).

examined what, precisely, constitutes the date of acceptance into an ARD program. Section 3806(b) of the Code states the following:

> Repeat offenses within ten years.--The calculation of prior offenses for purposes of sections 1553(d.2) (relating to occupational limited license), 3803 (relating to grading) and 3804 (relating to penalties) shall include any conviction, adjudication of delinquency, juvenile consent decree, acceptance of [ARD] or other form of preliminary disposition within the ten years before the present violation occurred for any of the following:
>
> (1) an offense under section 3802;
>
> (2) an offense under former section 3731;
>
> (3) an offense substantially similar to an offense under paragraph (1) or (2) in another jurisdiction; or
>
> (4) any combination of the offenses set forth in paragraph (1), (2) or (3).

75 Pa. C.S. § 3806(b). "The doctrine of *ejusdem generis* mandates that '[g]eneral expressions used in a statute are restricted to things and persons similar to those specifically enumerated in the language preceding the general expressions.'" Summit House Condominium v. Commonwealth, 514 Pa. 221, 227, 523 A.2d 333, 336 (1987) (emphasis in original) (quoting Butler Fair and Agricultural Association v. Butler School District, 389 Pa. 169, 178, 132 A.2d 214, 219 (1957)). In addition, Section 1903(b) of the Statutory Construction Act of 1972 states, in relevant part, that "[g]eneral words shall be construed to take their meanings and be restricted by preceding particular words." 1 Pa. C.S. §

1903(b). Thus, acceptance of ARD must be interpreted in light of the preceding references.

The language preceding "acceptance of [ARD]" in the Code, specifically, "conviction, adjudication of delinquency, [and] juvenile consent decree," 75 Pa. C.S. § 3806(b), are all various forms of official judicial action. While, under *ejusdem generis*, "acceptance of [ARD]" might not be considered a general term, given the nature of the items listed in Section 3806(b), we believe "acceptance of [ARD]" is meant to be construed like the other items listed. 75 Pa. C.S. § 3806(b). Thus, we conclude the General Assembly intended, for the purposes of the Code, that acceptance into an ARD program should be based on a judicial disposition and not an acceptance by the district attorney.

Likewise, the Pennsylvania Rules of Criminal Procedure clarify that the trial court accepts an individual into ARD and not the district attorney. Rule 313(c) of the Pennsylvania Rules of Criminal Procedure states the following:

> After hearing the facts of the case, *if the judge believes that it warrants [ARD]*, the judge shall order the stenographer to reopen the record and shall state to the parties the conditions of the program. *If the judge does not accept the case for [ARD]*, the judge shall order that the case proceed on the charges as provided by law. No appeal shall be allowed from such order.

Pa.R.Crim.P. 313(c) (emphasis added). Rule 313 implies that the acceptance by the district attorney is not final, but that it is the trial court that makes the final

determination of whether an individual is accepted into the ARD program. Pa.R.Crim.P. 313(c).

Secondly, Rule 313(d) states, in relevant part, "the defendant shall thereupon state to the judge whether the defendant accepts the conditions and agrees to comply. If the statement is in the affirmative, the judge may grant the motion for [ARD] and shall enter an appropriate order as set forth in Rules 314 and 315." Pa.R.Crim.P. 313(d).[5] The language of Rule 313(d) makes it clear that the defendant must first accept the conditions of ARD in front of the judge, implying that the defendant has not officially accepted the terms of ARD when he previously discussed acceptance into the ARD program with the district attorney. Id. Also, Rule 313(d) declares the judge *may* grant the motion and then enter an order approving an individual for ARD, but does not state that the judge *must* grant the motion based upon previous acceptance of the district attorney. Id. In addition, Rule 313(d) also states that, "[i]f the defendant answers in the negative, [for acceptance into ARD] the judge shall proceed as set forth in Rule 317." Id. Rule 317 states that "[i]f a defendant refuses to accept the conditions required by the judge, the judge shall deny the motion for [ARD]. In such event, the case shall proceed in the same manner as if these proceedings had not taken place." Pa.R.Crim.P. 317. Again, Rule 317 indicates that acceptance into the ARD program is not final until the defendant accepts the

[5] Rule 314 states that, after an individual is accepted into ARD, the judge "shall order that no information shall be filed with the court on the charges contained in the transcript during the term of the program." Pa.R.Crim.P. 314. Rule 315 states that after an individual is accepted into ARD and the information is filed, "the judge shall order that further proceedings on the charges shall be postponed during the term of the program." Pa.R.Crim.P. 315.

conditions of the judge and the judge then accepts the individual into the ARD program. Id.

Licensee is correct that a trial court cannot admit a defendant into the ARD program unless the district attorney submits the case for the trial court to do so, and that the sole authority to submit a case for ARD approval falls within the discretion of the district attorney. Commonwealth v. Lutz, 508 Pa. 297, 310, 495 A.2d 928, 935 (1985). However, Licensee is incorrect in stating that the person seeking to be admitted into the ARD program by a trial court is already accepted by the time of the hearing simply because the district attorney has the authority to submit the matter to the trial court in the first instance. While this Court has not addressed the question of when acceptance into ARD occurs, the Superior Court has. In Commonwealth v. Ayers, 525 A.2d 804 (Pa. Super. 1987), Ayers was arrested for sexual assault of a minor, and the district attorney signed a motion proposing he be admitted into ARD. Id. at 805. The trial court refused to allow Ayers into the ARD program, "citing the violent nature of his heinous and disgusting crime as the basis for its decision." Id. The sole question considered by the Superior Court in Ayers was "whether a trial court may reject a Commonwealth motion to admit a defendant into the ARD program." Id. The Superior Court stated that "judges are not to serve as mere rubber stamps approving all Commonwealth motions for admission to the program." Id. at 806. The Superior Court relied on the language of Rule 313(c) of the Pennsylvania Rules of Criminal Procedure, specifically referring to the language that "[a]fter hearing the facts of the case, if the judge believes that it warrants [ARD], the judge shall order the stenographer to reopen the record and

shall state to the parties the conditions of the program." Id.; Pa.R.Crim.P. 313(c). The Superior Court held that "once the case is submitted, the trial court is free to reject it based upon its view of what is beneficial to the community." Ayers, 525 A.2d at 807.

Ayers stands for the principle that the trial court is the entity that accepts a person into the ARD program and is not merely a rubber stamp of the district attorney's recommendation. Id. at 806. It is the gate keeping role of the trial court in the ARD hearing to make decisions "in the best interests of the community which it serves" and to consider the circumstances of each individual case. Id. at 808. Thus, we agree with the Superior Court that it is the trial court that ultimately determines whether an individual is accepted into ARD and that the date a person is accepted into ARD is the date of the trial court's ARD hearing. Here, Licensee was initially approved for the ARD program by the district attorney, but he was not finally and officially accepted into the ARD program until September 15, 2000, the date the trial court agreed that he should be accepted into ARD. We would, therefore, reject Licensee's argument that he was accepted into the ARD program on a date before September 15, 2000.

The date to which the courts apply the ten year look-back period is evidenced by the Superior Court's decision in Commonwealth v. Love, 957 A.2d 765 (Pa. Super. 2008). In Love, the district attorney accepted the licensee into the ARD program on June 1, 2006 and the trial court approved the ARD placement on June 13, 2006. Love, 957 A.2d at 766. In Love, the Superior

Court examined, as we do here, what constitutes a prior offense for purposes of the ten year look-back period under Section 3806(b) of the Code, and specifically focused on the language "acceptance of [ARD]," 75 Pa. C.S. § 3806. Love, 957 A.2d at 767. The Superior Court, in Love, calculated the ten year look-back period from the date the trial court approved the ARD placement, reasoning that "Appellant's 'present violation' occurred on September 16, 2006. Looking back from that date, there clearly existed Appellant's acceptance into ARD on June 13, 2006, which was well within the ten[ ]year look-back period." Id. at 770. Thus, it is apparent from Love that the Superior Court used the trial court's approval of ARD, rather than the district attorney's acceptance date, as the date when acceptance of ARD occurs.

We acknowledge the Department's argument that the only document it receives indicating the ARD acceptance is the "Report of the Clerk of Courts Showing Accelerated Rehabilitative Disposition of Any Violation of the Vehicle Code and/or Any Other Act in Which a Judge Determines That a Motor Vehicle Was Essentially Involved" (Form), (Report of the Clerk of Courts at 1, R.R. at 28a), which certifies the date of ARD acceptance. (Department Reply Br. at 4.) If we were to hold that the date of an individual's acceptance into the ARD program is a date other than the date certified on the Form, which is the date of the trial court's determination, it will be difficult for trial courts, the Department, and licensees to determine the precise date of acceptance of ARD.

Licensee, in his brief, presents an elaborate argument citing various Rules of Criminal Procedure and how these rules should be interpreted in support of

his position.[6] Licensee contends that, because Section 3806(b) of the Code does not use the terms "placement hearing" or "admission" into the ARD program, the "acceptance" referred to in that section must mean acceptance by the district attorney. Licensee also maintains that "offered," "accepts," and "placed" are separate terms that should be treated differently.[7] Under Licensee's argument, the ARD hearing becomes a meaningless formality—a position specifically rejected by the Superior Court in Ayers, 525 A.2d at 806-07. Despite Licensee's arguments, we would be persuaded by the doctrine of *ejusdem generis*; Section 1903(b) of the Statutory Construction Act of 1972 (explaining statutory construction); Rule 313(c), (d), and Rule 317 of the Pennsylvania Rules of

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[6] For example, Licensee cites Rule 312 of the Pennsylvania Rules of Criminal Procedure, which states, in relevant part, the following:

> Hearing on a motion for [ARD] shall be in open court in the presence of the defendant, the defendant's attorney, the attorney for the Commonwealth, and any victims who attend. At such hearing, it shall be ascertained on the record whether the defendant understands that:
>
> (1) *acceptance into* and satisfactory completion of the [ARD] program offers the defendant an opportunity to earn a dismissal of the pending charges.

Pa.R.Crim.P. 312 (emphasis added). Licensee asserts that the term "acceptance into" is used in the past tense in Rule 312 because the applicant has already been accepted into the ARD program by the district attorney.

[7] Licensee cites Section 81.2 of the Department's regulations which states, "[i]f a person is *offered and accepts* [ARD] disposition under the Pennsylvania Rules of Criminal Procedure . . . the court shall promptly notify the Department." 67 Pa. Code § 81.2 (emphasis added). Section 81.2 of the regulations also states that the content of the report shall include the "[n]ame and current address of the individual *placed* on [ARD]." Id. (emphasis added). Licensee argues that this language means the district attorney makes the offer, the applicant accepts the offer, and the applicant is placed in the ARD program by the trial court during the ARD hearing.

Criminal Procedure; Love; and Ayers, that neither the Commonwealth nor a defendant has officially accepted ARD until the final hearing before the trial court, when the defendant is officially placed into the ARD program.

Therefore, even if Licensee had not waived his argument, we would not agree with his position. However, because the trial court erred in failing to apply and follow Dick, we reverse the Order of the trial court.

RENÉE COHN JUBELIRER, Judge

Judge McCullough concurs in the result only.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph J. Rudisill	:	
	:	
v.	:	No. 2475 C.D. 2010
	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
	:	
Appellant	:	

O R D E R

NOW, August 10, 2011, the Order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is hereby **REVERSED** and the twelve-month suspension of Joseph J. Rudisill's driver's license is hereby **REINSTATED.**

RENÉE COHN JUBELIRER, Judge