

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Peter C. Povanda, Esq. :
 :
 v. : No. 2590 C.D. 2010
 :
 Commonwealth of Pennsylvania, : Submitted: May 20, 2011
 Department of Transportation, :
 Bureau of Driver Licensing, :
 Appellant :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE MARY HANNAH LEAVITT, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY SENIOR JUDGE KELLEY

FILED: August 4, 2011

The Department of Transportation, Bureau of Driver Licensing (DOT) appeals from an order of the Court of Common Pleas of Lackawanna County (Trial Court) which granted the appeal of Peter C. Povanda (Licensee) from a one-year suspension of Licensee's operating privilege imposed by DOT pursuant to Section 1547(b)(1) of the Vehicle Code, 75 Pa.C.S. §1547(b)(1).¹ We vacate and remand.

¹ Section 1547(b)(1) of the Vehicle Code reads, in relevant part:

(b) Suspension for refusal.--

(Continued....)

On June 18, 2010, Officer Christopher P. Tully of the Dickson City Borough Police Department responded to a call at a local Wal-Mart, where Officer Tully encountered Licensee seated behind the wheel of a motor vehicle. Officer Tully then observed on Licensee the indicia of intoxication, including a strong odor of alcohol and bloodshot eyes. When approached by Officer Tully, Licensee responded that “you didn’t see me drive this car.”

Officer Tully placed Licensee under arrest and transported him to Dickson City’s Driving Under the Influence Center. Licensee was refused admission to the Center due to his apparent intoxicated state, and Officer Tully then drove Licensee to the Community Medical Center (CMC) for detoxification.

While at CMC, a Doctor requested that Licensee provide a blood sample for use in his medical diagnosis and treatment, which sample Licensee voluntarily provided. Officer Tully was thereafter granted a search warrant for Licensee’s medical records, including the blood sample. Upon serving that warrant upon CMC, the records were provided to Officer Tully, including the

(1) If any person placed under arrest for a violation of section 3802 [relating to driving under the influence of alcohol] 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, the department shall suspend the operating privilege of the person as follows:
(i) . . . for a period of 12 months.

results of chemical testing showing that Licensee's blood alcohol content was .438%.²

On July 20, 2010, Licensee was mailed a notice from DOT informing him of a one-year suspension of his operating privilege due to a refusal to submit to chemical testing pursuant to Section 1547(b)(1) of the Vehicle Code. Licensee appealed the suspension to the Trial Court, and a hearing was held thereafter at which both Licensee and DOT appeared and were represented by counsel.

In part relevant hereto, Officer Tully testified that prior to taking Licensee to either CMC or the DUI Center, he had taken Licensee to Mid Valley Hospital where Officer Tully read Licensee, *verbatim*, Form DL-26, which contains the chemical testing warnings required by Section 1547 of the Vehicle Code. Reproduced Record (R.R.) at 21a-22a. Officer Tully testified that following the receipt of the warnings from Form DL-26, Licensee was then requested to submit to chemical testing. Id. Officer Tully testified that in response to his requests, Licensee remained silent, and refused to sign Form DL-26 acknowledging his understanding of the consequences of a refusal. Id. Then, Officer Tully testified, Licensee was transported to the DUI center, and eventually

² Section 3802 of the Vehicle Code, 75 Pa.C.S. §3802, states generally that an individual may not drive a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.08% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

to CMC, where Licensee's chemical testing was eventually performed, and the results turned over to Officer Tully pursuant to his warrant. Id. at 26a-27a.

Licensee testified that he voluntarily submitted to a requested breath test at Wal-Mart, but had no recollection of being requested to submit to any chemical testing, and had no recollection of having been read Form DL-26. Id. at 32a-39a. Licensee testified that he did not at any time refuse any requested chemical testing. Id. at 36a.

The Trial Court concluded:

Here, given that [Licensee] voluntarily provided a blood sample to a medical professional and chemical testing was successfully performed on this sample yielding a reliable indication of [Licensee's] blood alcohol concentration at the time of the incident, and given that the results of this testing are now in possession of Officer Tully and the Dickson City Police Department, we find insufficient evidence to establish that [Licensee] refused to provide a blood sample as required under § 1547(b)(1) [of the Vehicle Code].

Trial Court Opinion at 4. Accordingly, the Trial Court granted Licensee's appeal.

DOT now appeals from the Trial Court's order.

Our scope of review in an operating privilege suspension case is confined 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.

Department of Transportation, Bureau of Driver Licensing v. Ingram, 538 Pa. 236, 648 A.2d 285 (1994).

In order to support a one-year suspension of an operating privilege imposed in conformity with Section 1547(b) as a consequence of a chemical test refusal related to an arrest for violating Section 3802 of the Vehicle Code, 75 Pa.C.S. §3802, DOT must establish that: 1) the licensee was arrested for violating Section 3802; 2) by a police officer who had reasonable grounds to believe that the licensee was operating a vehicle while in violation of Section 3802; 3) that the licensee was requested to submit to a chemical test; 4) that the licensee refused to do so; and 5) that the police officer fulfilled the duty imposed by Section 1547(d)(2) by advising the licensee that his operating privilege would be suspended if he refused to submit to chemical testing and that, in the event the licensee pleaded guilty or *nolo contendere* to or was found guilty of violating Section 3802(a)(1) after refusing testing, the licensee would be subject to the penalties set forth in Section 3804(c). Martinovic v. Department of Transportation, Bureau of Driver Licensing, 881 A.2d 30, 34 (Pa. Cmwlth. 2005). Once DOT meets its burden, it is the licensee's responsibility to prove that he was not capable of making a knowing and conscious refusal to take the chemical test. Id. The law requires that the police must tell the licensee of the consequences of a refusal to take the test so that he can make a knowing and conscious choice. Department of

Transportation, Bureau of Traffic Safety v. O'Connell, 521 Pa. 242, 555 A.2d 873 (1989).

DOT presents one issue for review: where Licensee refused Officer Tully's initial request for chemical testing, did the eventual receipt of subsequent chemical test results by the Officer resulting from the execution of a search warrant vitiate Licensee's earlier test refusal to comply with the requirements of Section 1547 of the Vehicle Code.

As noted in our recitation of the salient facts in this matter, the record reveals that Licensee, and Officer Tully, gave conflicting testimony regarding whether Licensee was requested to submit to chemical testing, on whether Licensee was read the DL-26 warnings, and on whether Licensee refused any such testing request. The Trial Court's opinion in this matter made no express credibility determinations, and made no findings or concomitant conclusions regarding that conflicting testimony, and regarding any such testing request and/or refusal. Absent such credibility determinations, findings, and conclusions on whether or not Licensee refused a chemical testing request offered by Officer Tully, any effective appellate review on this dispositive issue is precluded.

Accordingly, we vacate the Trial Court's order, and remand this matter for appropriate findings of fact and conclusions of law on whether or not Licensee refused a request for chemical testing in this matter.

JAMES R. KELLEY, Senior Judge

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Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

ORDER

AND NOW, this 4th day of August, 2011, the order of the Court of Common Pleas of Lackawanna County dated November 17, 2010, at No. CV 5445, is vacated, and this matter is remanded for additional findings of fact and conclusions of law in accordance with the foregoing opinion.

Jurisdiction relinquished.

JAMES R. KELLEY, Senior Judge