

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Rashed Kabir,	:	
	:	
Appellant	:	
	:	
v.	:	
	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	No. 264 C.D. 2010
Bureau of Driver Licensing	:	Submitted: July 16, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: September 15, 2010

Rashed Kabir (Kabir) appeals the November 9, 2009 order of the Court of Common Pleas of Allegheny County (trial court) dismissing Licensee's appeal from his driver's license suspension for refusal to submit to chemical testing. The issue raised by Licensee is whether the trial court erred as a matter of law in determining that he was properly informed of his DL-26 warnings for refusal to submit to chemical testing. The Pennsylvania Department of Transportation (PennDOT) raises two additional issues: 1) whether the trial court erred as a matter of law in granting Kabir's Motion to Extend Filing of Commonwealth Court Appeal and Supersedeas Nunc Pro Tunc, and 2) whether PennDOT is entitled to the award of reasonable counsel fees pursuant to Pa.R.A.P. 2744. For the reasons that follow, we affirm the trial court's November 9, 2009 order.

Officers responded to a hit-and-run accident at 2:45 a.m. on June 28, 2009. Officer Frank Benigni arrived on the scene, and shortly after, another officer

located a vehicle at Kabir's residence that fit the description of the vehicle that had left the scene of the accident. Officer Benigni arrived at Kabir's residence after the two other officers, Officers Kimmel and McMinn,¹ had started questioning Kabir. Kabir was placed under arrest at his home for Driving Under the Influence. He agreed to submit to a blood test, and Officer Kimmel transported him to the hospital to draw blood. Upon arrival at the hospital, Kabir refused to submit to a blood test because he claimed Officer Kimmel told him during the ride to the hospital, "that if he did not take the test, he would go to jail, and if he took the test, he would go home." Appellant's Br. at 7. Further, he claimed that he had a drink at home and did not want to have falsified test results. Officer Benigni, who drove separately from Kabir and Officer Kimmel, read Kabir the DL-26 Chemical Test Warnings Form verbatim. Kabir refused to sign the DL-26 Form. A hearing was held on October 15, 2009 at which Officer Benigni and Kabir testified. Kabir maintained that he was never read the warnings by any of the officers nor was he asked to sign the form. On November 9, 2009 the trial court issued an order dismissing Kabir's appeal in light of Officer Benigni's testimony. On January 28, 2010, Kabir filed a Motion to Extend Filing of Commonwealth Court Appeal and Supersedeas Nunc Pro Tunc claiming that he did not receive notice of the trial court's November 9, 2009 order until December 22, 2009. The trial court granted Kabir's motion for an extension of time to file his appeal due to a breakdown in the trial court's operations. Kabir's appeal is now before this Court.²

¹ Officers Kimmel and McMinn did not testify, and their first names were not mentioned in the testimony.

² "In an appeal arising from a suspension of a driver's license, [this Court's] scope of review is limited to determining whether the trial court's decision is supported by substantial evidence, whether there has been an error of law, or whether the decision of the trial court indicates a manifest abuse of discretion." *Pappas v. Dep't of Transp., Bureau of Driver Licensing*, 669 A.2d 504, 507 n.4 (Pa. Cmwlth. 1996). Further, "[o]ur scope of review of a trial court's decision

In his brief, Kabir asserts that “the Commonwealth has submitted insufficient evidence that police read him the required warnings. While Officer Benigni did testify that he read to Appellant the warnings . . . significantly, Appellant testified that he was not read the DL-26 form and was not asked to sign such a form.” Kabir’s Br. at 10. Kabir also contends in his brief that even if the officer did read him the DL-26 warnings, the “misinformation” that Officer Kimmel gave him during the ride to the hospital rendered the warnings void. Kabir’s Br. at 11. We disagree. We note that both of Kabir’s arguments concern the trial court’s determination that it did not credit his testimony. The trial court specifically stated that it found Officer Benigni’s testimony credible, and declined to credit Kabir’s claims that he was given false information by another officer. Kabir’s appeal is, therefore, without merit because it is based solely upon the dispute of the trial court’s credibility determinations. The trial court has exclusive province over questions of credibility and evidentiary weight. *Repash v. Workers’ Comp. Appeal Bd.* (City of Philadelphia), 961 A.2d 227, 233 (Pa. Cmwlth. 2008). The trial court’s findings of fact are, thus, binding if supported by substantial evidence. *Id.* Here the trial court’s findings of fact are supported by the police officers’ testimony. We hold that the trial court did not err in determining that Kabir was properly informed of his DL-26 warnings for refusal to submit to chemical testing.

In light of our determination, we decline to reach the issue of the timeliness of Kabir’s appeal. Further, we note that the award of counsel fees under Pa.R.A.P. 2744 is discretionary in nature and would require further proceedings to determine the appropriate amount of fees if such fees were to be awarded. Thus, in

permitting an appeal *nunc pro tunc* is limited to determining whether the trial court committed an error of law or abused its discretion.” *Anderson v. Dep’t of Transp., Bureau of Driver Licensing*, 744 A.2d 825, 827 n.2 (Pa. Cmwlth. 2000).

the interest of judicial economy, we decline to address the issue of counsel fees to be paid to PennDOT.

For the reasons stated above, the trial court's November 9, 2009 order is affirmed.

JOHNNY J. BUTLER, Judge

Judge McCullough dissents.

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ORDER

AND NOW, this 15th day of September, 2010, the November 9, 2009 order of the Court of Common Pleas of Allegheny County is affirmed.

JOHNNY J. BUTLER, Judge