IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Diana Renee Mason	:	
	:	
v.	:	
	:	No. 2684 C.D. 2010
Commonwealth of Pennsylvania,	:	Submitted: April 29, 2011
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: July 15, 2011**

The Department of Transportation, Bureau of Driver Licensing (DOT) appeals from the order of the Court of Common Pleas of York County (trial court) that sustained Diana Mason's (Licensee) appeal from DOT's suspension of her driving privileges for refusing to submit to a chemical blood test pursuant to Section 1547(b)(1)(i) of the Vehicle Code, 75 Pa. C.S. §1547(b)(1)(i).[1] The issues are whether Licensee was under arrest and whether she knowingly refused to submit to testing. Finding no error, we affirm.

[1] Section 1547 is commonly referred to as the "Implied Consent Law." That Section states any person who drives a vehicle in the Commonwealth is deemed to give his consent to one or more chemical tests of breath, blood or urine for purposes of determining blood alcohol content if a police officer has reasonable grounds to believe the person drove the vehicle under the influence. Section 1547(b)(1)(i) states, "If any person placed under arrest for [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 the department shall suspend the operating privilege of the person … for a period of 12 months." 75 Pa. C.S. §1547(b)(1)(i).

Most of the facts of this case are not in dispute. Licensee called 911 and informed the dispatcher she had been raped. A state trooper arrived at her location. Licensee was not in an accident, but she parked her car on the side of Interstate 83. Notes of Testimony (N.T.)11/24/10, at 5. The trooper found her in the driver's seat of her vehicle. She was crying and still talking with the 911 dispatcher. N.T. at 12-13.

The trooper noted her pupil size was constricted, her speech was slurred slightly, and that she had a strong odor of alcohol. N.T. at 8. The trooper spoke with the 911 dispatcher, and she then drove Licensee to a nearby hospital for testing and treatment for rape. N.T. at 13.

Another trooper arrived at the hospital, and he noticed Licensee's red, glossy eyes, slurred speech, and difficulty maintaining balance. N.T. at 19. Based on his 17 years of experience, he concluded Licensee "was highly intoxicated." N.T. at 19.

At the hospital, Licensee told the troopers she had been drinking alcohol and using cocaine. N.T. at 8. She claimed she was raped by two men. She informed the troopers that she left the house after everyone fell asleep. N.T. at 15. She stated that she did not wish to pursue charges against the men because she was on probation.

While waiting for Licensee to undergo her medical assessment and treatment, the troopers talked to each other and concluded there were

inconsistencies in Licensee's statements. The troopers decided "it would be beneficial to talk [with Licensee] about signing a refusal form because she refused to give blood for a possible DUI." N.T. at 18.

The troopers' testimony about their conversation with Licensee is critical to evaluating the present appeal. One trooper testified that:

> It was explained to Miss Mason there were inconsistencies in her story. We had to talk to the DA, so it was explained to her that we wanted her to take a blood test. And if it turned out that her story was legitimate, we would talk to the DA, this was not going forward. She refused to listen to the refusal being read to her several times.

N.T. at 18. The other trooper, describing the same conversation, testified:

> I advised [Licensee] due to her being under the influence of alcohol that I need to read her the implied consent and O'Connell[2] warnings referencing that, and nothing would be followed through with unless the [rape] investigation revealed that it was inconclusive.

N.T. at 8-9 (footnote added).

Licensee was upset and crying. N.T. at 21. She yelled obscenities at the troopers. N.T. at 10. She stated she was the victim. N.T. at 22. She asked why she was being interrogated for driving under the influence (DUI) instead of receiving treatment for rape. N.T. at 22.

[2] Dep't of Transp., Bureau of Traffic Safety v. O'Connell, 521 Pa. 242, 555 A.2d 873 (1989).

One trooper read the first three paragraphs of the DL-26 form. N.T. at 10. The part the trooper did not read, the fourth paragraph, addresses the right to counsel in an informed consent case and how conduct could constitute a refusal.[3] These warnings are sometimes referred to as O'Connell warnings. See Dep't of Transp., Bureau of Traffic Safety v. O'Connell, 521 Pa. 242, 555 A.2d 873 (1989).

Licensee exclaimed, "Oh, f*ck no, I'm not going back to prison or jail." N.T. at 10. Based on her refusal to listen, and her repeated yelling of obscenities, the trooper stopped reading the DL-26 warnings and marked on the

[3] Paragraphs one through four of the DL–26 form provided at the time of the incident:

1. Please be advised that you are under arrest for driving under the influence of alcohol or controlled substance in violation of Section 3802 of the Vehicle Code.

2. I am requesting that you submit to a chemical test of blood.

3. It is my duty as a police officer to inform you that if you refuse to submit to the chemical test, your operating privilege will be suspended for at least 12 months, and up to 18 months, if you have prior refusals or have been previously sentenced for driving under the influence. In addition, if you refuse to submit to the chemical test, and you are convicted of or plead to violating Section 3802(a)(1) (relating to impaired driving) of the Vehicle Code, because of your refusal, you will be subject to more severe penalties set forth in Section 3804(c) (relating to penalties) of the Vehicle Code, which include a minimum of seventy-two hours in jail and a minimum fine of $1,000.00, up to a maximum of five years in jail and a maximum fine of $10,000,000.

4. It is also my duty to inform you that you have no right to speak with an attorney or anyone else before deciding whether to submit to testing and any request to speak with an attorney or anyone else after being provided these warnings or remaining silent when asked to submit to chemical testing will constitute a refusal, resulting in the suspension of your operating privilege and other enhanced criminal sanctions if you are convicted of violating Section 3802(a) of the Vehicle Code.

form that Licensee refused to submit to testing. N.T. at 10; 18-19. She did not read the form, nor did she sign it. The troopers left after a local police officer arrived at the hospital to investigate the rape. N.T. at 15. At the time of their departure, the troopers were not sure if the rape assessment and treatment started. N.T. at 15.

Subsequently, DOT notified Licensee of the one-year suspension of her driving privilege under 75 Pa. C.S. §1547(b)(1) based on her refusal to submit to chemical testing after being arrested for DUI. Licensee appealed the suspension to the trial court.

At a hearing before the trial court, the only witnesses were two state troopers. The first testified she took Licensee into custody and transported her to the hospital for treatment. N.T. at 7. She testified that Licensee was coherent when responding to questions. N.T. at 10-11. The second trooper testified he was present at the hospital when the first trooper tried to obtain Licensee's consent, but Licensee would not consent to blood testing.

Following the close of DOT's case, Licensee's counsel argued to the trial court that DOT failed to meet its burden. Counsel asserted Licensee was not arrested at any point. DOT countered that the consent form language (DL-26) read to Licensee told her she was under arrest.

The trial court observed, "Well, [the troopers] didn't [really arrest Licensee] because they told her, you might or you might not be prosecuted. That's

the problem. We'll give you these warnings in the event that we might later decide to do something." N.T. at 24. The trial court further said, "There's no testimony that her freedom was restricted in any way, that she wasn't free to leave the hospital." N.T. at 24-25.

The trial court sustained Licensee's appeal. It found the testimony of the troopers credible. However, it concluded the circumstances would not give a reasonable person the understanding that she was under arrest. The trial court relied on several factors. First, Licensee initiated contact with police by calling 911. As such, the troopers responding to the scene were investigating a crime of which Licensee was the victim. Second, it was unclear whether a DUI prosecution would follow the events at the hospital. Third, the troopers were required under the law to read all four paragraphs of warnings, but they did not read them all.

Before the Court on its appeal, DOT raises two arguments: Licensee was arrested when the trooper read the DL-26 warnings; and, by her conduct Licensee knowingly refused the chemical test and prevented the completion of the warnings.[4]

Section 1547(b)(1)(i) of the Vehicle Code, 75 Pa. C.S. §1547(b)(1)(i), requires DOT to suspend a person's driving privileges for one year for refusing to submit to chemical testing, The issue of whether a licensee refused chemical

[4] Our review is limited to determining whether the trial court committed an error of law or abused its discretion, and whether necessary findings were supported by substantial evidence. Reinhart v. Dep't of Transp., Bureau of Driver Licensing, 946 A.2d 167 (Pa. Cmwlth. 2008).

testing is one of law, based upon the facts found by the trial court. Tullo v. Dep't of Transp., Bureau of Driver Licensing, 837 A.2d 605 (Pa. Cmwlth. 2003). To suspend a licensee's operating privilege under 75 Pa. C.S. §1547(b), DOT must establish: 1) the licensee was arrested for a violation of 75 Pa. C.S. §3802 (DUI); 2) by a police officer with reasonable grounds to believe the licensee was driving in violation of 75 Pa. C.S. §3802; 3) the licensee was requested to submit to chemical testing; 4) the licensee refused to submit to chemical testing; and 5) the officer fulfilled the duty imposed by 75 Pa. C.S. §1547(b)(2) by advising the licensee that her license will be suspended if she refused to submit to chemical testing and is convicted of violating 75 Pa. C.S. §3802. Solomon v. Dep't of Transp., Bureau of Driver Licensing, 966 A.2d 640 (Pa. Cmwlth. 2009).

Here, DOT contends the trial court erred in concluding that the troopers did not arrest Licensee for purposes of Section 1547. DOT argues our decision in Maletic v. Department of Transportation, Bureau of Driver Licensing, 819 A.2d 640 (Pa. Cmwlth. 2003) (*en banc*) is controlling and establishes that a licensee to whom the DL-26 is read, is considered to be under arrest for purposes of Section 1547.

Whether a driver is arrested "for purposes of Section 1574(b) is a factual rather than a legal determination, and all that is necessary is that the driver be under the custody and control of the person effecting the arrest." Woods v. Dep't of Transp., Bureau of Driver Licensing, 541 A.2d 846, 848 (Pa. Cmwlth. 1988). "The relevant inquiry is whether the licensee, at the time the testing request is made, would have inferred from the totality of the circumstances that he or she was under the custody and control of the police officer." Maletic, 819 A.2d at 643.

In Maletic, the licensee was involved in a single car accident. After the licensee was removed from her car, the responding police officer questioned her. She exhibited slurred speech and a strong odor of alcohol on her breath, and she had a case of beer in her car. She was transported to a hospital for treatment. There the officer found the licensee on a gurney with medical personnel extracting blood from her for medical purposes. The officer told her she was under investigation for DUI. The officer read the warnings on the DL-26. Among other things, the DL-26 contained the following language: "Please be advised that you are now under arrest for driving under the influence of alcohol or a controlled substance pursuant to Section 3731 of the Vehicle Code." Maletic, 819 A.2d at 642. The officer requested several times that the licensee consent to having her blood drawn for legal as well as medical purposes; however, she refused. As a result, DOT suspended her license.

The licensee appealed the suspension on several grounds, including that the officer did not arrest her. At the hearing on the licensee's appeal:

> Officer Baird testified both that Licensee was not under arrest at the time he read the Form DL-26 to Licensee, and that he considered his reading of the form as placing Licensee under arrest. Aside from his verbatim reading of the Form DL-26, he did not tell Licensee that she was under arrest or was not free to leave. He did not give the form to Licensee to read, and he did not know whether Licensee understood what he was reading to her. He also stated that he never physically arrested Licensee or took her into custody. He testified that, had she not been injured, he would have arrested her, but stated that he did not arrest her.

Id. at 642. The trial court concluded that licensee was not arrested.

On further appeal, this court reversed and upheld the suspension. We agreed with DOT's argument that under the totality of the circumstances the licensee was arrested: the officer read the DL-26 to the licensee; he testified that he would have arrested the licensee but for her ongoing treatment; and he testified that licensee "was not going to be leaving the hospital anytime soon" because of her treatment. Id.

We conclude this case is distinguishable from Maletic in several ways. First, in Maletic, the licensee's involvement in a single car accident brought about the police investigation. The nature of her accident necessarily made her the primary focus of the investigation. In contrast, the trooper here became involved only at the request of Licensee, and then, only in regards to an episode in which she was the victim. Thus, the relationship between Licensee and law enforcement here is different than the relationship between the licensee and law enforcement in Maletic. In reaching this conclusion we acknowledge Licensee's concerns that finding an arrest in this situation, when a person is seeking assistance following an alleged sexual assault, could have a chilling effect on individual's willingness to report such incidents.

Second, the troopers in the present case lacked the clear intent to arrest. The trooper read the first paragraph of DL-26. However, both troopers also told Licensee that things would not "go forward" under certain future circumstances. The equivocal, contingent statements are far different from the situation in Maletic, where the officer left no doubt that, but for the Licensee's medical treatment, he would have arrested her and taken her for booking. For

these reasons, the circumstances in this case are qualitatively different than the circumstances in Maletic.

We agree with the trial court's determination that the troopers' statements to Licensee were:

> Not statement[s] of intention or actions demonstrating that the licensee was being placed under arrest for violating Section 3802 under the circumstances presented. This indecision by the officers to proceed with a DUI case at that time was communicated to the motorist which we believe adds an additional problem … in that they may have induced the motorist to not submit to the chemical test because of the uncertainty as to whether or not a criminal prosecution would follow.

N.T. at 29. Because as the fact finder the trial court was free to draw any reasonable inferences, and it chose to draw these state-of-mind inferences in favor of Licensee, we discern no error in the trial court's factual determination as to arrest. Accordingly, we reject DOT's argument.

DOT next argues the trial court erred in concluding the trooper's inability to read all four DL-26 warnings excuses Licensee's conduct. DOT argues that under Harris v. Department of Transportation, Bureau of Driver Licensing, 969 A.2d 30, 32 (Pa. Cmwlth. 2009) (*en banc*) a licensee may by conduct demonstrate that his subsequent actions are undertaken with knowledge of his rights.

Having concluded that the trial court did not err in its factual determination that Licensee was not arrested for purposes of Section 1574 (b), it is unnecessary to discuss this second issue at length. It is sufficient to note that Harris is clearly distinguishable on its facts because the current record lacks support for a finding that Licensee knew her rights. The trial court correctly determined that the O'Connell warnings were not read to Licensee although they should have been read to her. Consequently, DOT did not carry its burden of proof on this element. For this additional reason we affirm the trial court's order.

ROBERT SIMPSON, Judge

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	:	No. 2684 C.D. 2010
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

O R D E R

AND NOW, this 15th day of July, 2011, the order of the Court of Common Pleas of York County is **AFFIRMED**.

ROBERT SIMPSON, Judge

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Diana Renee Mason	:	
	:	
v.	:	
	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	No. 2684 C.D. 2010
Appellant	:	Submitted: April 29, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: July 15, 2011

The central issue in this appeal is whether Diana Renee Mason (Licensee) was arrested for driving under the influence (DUI) for purposes of Section 1547(b)(1)(i) of the Vehicle Code, 75 Pa. C.S. §1547(b)(1)(i). Because Licensee was under the custody and control of the Pennsylvania State Police (PSP) and the Trooper's statement that charges may not go forward does not vitiate the arrest, I respectfully dissent.

As the majority points out, in order to suspend a licensee's operating privilege under Section 1547(b) of the Vehicle Code, the Department of Transportation (Department) must prove "that the licensee (1) was arrested for

driving while under the influence by a police officer who had reasonable grounds to believe that the licensee was operating a vehicle while under the influence of alcohol or a controlled substance, (2) was asked to submit to a chemical test, (3) refused to do so, and (4) was warned that a refusal would result in a license suspension." *Maletic v. Department of Transportation, Bureau of Driver Licensing*, 819 A.2d 640, 643 (Pa. Cmwlth. 2003) (en banc). The majority also notes that whether a driver has been placed under arrest for purposes of Section 1574(b) is a factual determination and "all that is necessary is that the driver be under the custody and control of the person effecting the arrest." *Woods v. Department of Transportation, Bureau of Driver Licensing*, 541 A.2d 846, 848 (Pa. Cmwlth. 1988).

Licensee was under the custody and control of the PSP Troopers in this case. Trooper Miller testified that she took Licensee into custody and transported her to hospital. While at the hospital, the Troopers questioned Licensee while she was in a room awaiting treatment because she appeared to be heavily intoxicated. Licensee admitted to drinking alcohol and using cocaine. The Troopers explained to Licensee that there were inconsistencies in her story, that they spoke to the District Attorney, and that they wanted her to take a blood test for DUI purposes. Trooper Miller then began reading Licensee the Implied Consent warnings from Department Form DL-26, Paragraph 1 which states, "You are *under arrest* for driving under the influence of alcohol or a controlled substance in violation of Section 3802 of the Vehicle Code." (Reproduced Record (R.R.) at 64a). (Emphasis added). Both Troopers testified that when Licensee heard the Implied Consent warnings she stated, "Oh, fuck no, I'm not going back to prison or jail." (R.R. at 37a). Given the questioning by the Troopers, the statement in the Implied Consent warnings that Licensee was under arrest and Licensee's response,

a reasonable person would believe they were under the custody and control of the Troopers and not able to freely leave. According to this Court's prior decisions in DUI chemical testing refusal cases, Licensee was clearly under arrest and the trial court erred in determining otherwise. *Maletic*; *Department of Transportation, Bureau of Traffic Safety v. Uebelacker*, 511 A.2d 929 (Pa. Cmwlth. 1986); *Department of Transportation, Bureau of Traffic Safety v. Krishak*, 496 A.2d 1356 (Pa. Cmwlth. 1985). The mere fact that the Troopers told Licensee that her DUI charge may not go forward *in the future* does not vitiate the fact that she was arrested.[1]

Because I believe the actions of the Troopers in this case and their reading of the Implied Consent warnings to Licensee, which clearly states that she was under arrest for DUI, establish that Licensee was in fact arrested, I respectfully dissent.

DAN PELLEGRINI, Judge

[1] I would also note that despite the trial court's reasoning, the fact that Licensee was the one who initiated contact with the police because she was allegedly the victim of a crime is of no moment.