IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sigma Terna	:	
	:	
v.	:	No. 2718 C.D. 2010
	:	
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,	:	Submitted: June 24, 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: September 27, 2011**

Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (DOT) appeals from the order of the Court of Common Pleas of Montgomery County (trial court) that sustained the appeal of Sigma Terna (Licensee) from a one-year suspension of her operating privileges pursuant to Section 3804(e)(2)(iii) of the Vehicle Code, 75 Pa. C.S. § 3804(e)(2)(iii).[1] In sustaining the

[1] Section 3804(e) provides in pertinent part:

(e) Suspension of operating privileges upon conviction.--

(Continued…)

(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.

(ii) 18 months for a misdemeanor of the first 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). Subsection (a) of Section 3804 provides as follows:

(a) General impairment.--Except as set forth in subsection (b) or (c), an individual who violates section 3802(a) (relating to driving under influence of alcohol or controlled substance) shall be sentenced as follows:

(1) For a first offense, to:

(i) undergo a mandatory minimum term of six months' probation;

(ii) pay a fine of $300;

(iii) attend an alcohol highway safety school approved by the department; and

(iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 (relating to drug and alcohol assessments) and 3815 (relating to mandatory sentencing).

(2) For a second offense, to:

(i) undergo imprisonment for not less than five days;

(Continued…)

appeal, the trial court considered the sentencing sheet from Licensee's criminal case at docket number CR-7013-09, which was not admitted at the hearing but which the trial court considered part of the trial court's records, and found that the Form DL-21, the Clerk of Court's report of Licensee's conviction (DL-21), which was admitted at the hearing and upon which DOT relied, was not a certified record of Licensee's conviction because the form is "unreliable" and "does not contain the details of [Licensee]'s sentence nor does it indicate whether this was a first offense." (Trial Ct. 1925(a) Op. at 2.) As such, the trial court held that, pursuant to the sentencing sheet, Licensee was subject to the penalties set forth under Section 3804(a), 75 Pa. C.S. § 3804(a), and, thus, was exempt from a one-year license suspension under Section 3804(e)(2)(iii). For the following reasons, we affirm the trial court's order.

In a criminal proceeding before the same Court of Common Pleas, Licensee pled guilty to DUI, general impairment, in violation of 75 Pa. C.S. § 3802(a).

(ii) pay a fine of not less than $300 nor more than $2,500;

(iii) attend an alcohol highway safety school approved by the department; and

(iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.

(3) For a third or subsequent offense, to:

(i) undergo imprisonment of not less than ten days;

(ii) pay a fine of not less than $500 nor more than $5,000; and

(iii) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.

75 Pa. C.S. § 3804(a) (emphasis added).

Subsequently, DOT notified Licensee via letter dated May 24, 2010, that her operating privileges would be suspended for one year pursuant to Section 3804(e)(2)(i) because she was not sentenced under Section 3804(a)(1) of the Vehicle Code, 75 Pa. C.S. § 3804(a)(1). Licensee filed a statutory appeal to the trial court, which held a hearing de novo.

At the hearing before the trial court DOT entered Commonwealth Exhibit 1, which included the DL-21, establishing Licensee's violation of Section 3802(a)(2) (DUI, general impairment). (DL-21, R.R. at 42a.) The DL-21 reported that Licensee was: convicted of a violation of 75 Pa. C.S. § 3802(a)(2), a misdemeanor ungraded offense; sentenced to prison; ordered to undergo treatment; and *not* sentenced under Section 3804(a)(1) of the Vehicle Code. (DL-21, R.R. at 42a.) DOT also included Licensee's certified driving history, which showed Licensee's violation of Section 3802(a)(2) and the resulting one- year suspension. (Certified Driving History, R.R. at 45a.) Because the DL-21 indicated that Licensee was *not* sentenced under Section 3804(a)(1), DOT argued that Licensee could not be exempt from a one-year suspension of her driving privileges under Section 3804(e)(2)(iii).

Before the trial court, Licensee conceded that all of the information on the DL-21 was correct *except* for the portion that indicated that Licensee was not sentenced under Section 3804(a)(1). Licensee indicated that even though this was not her first offense, which is the reason she was sentenced to a term of imprisonment, she was still sentenced under Section 3804(a)(1) and is entitled to the suspension exception.[2]

[2] Licensee's counsel conceded that Licensee had a prior DUI offense in Florida more than 14 years ago, "which was the reason why she was rejected from the ARD Program in the instant *(Continued…)*

In support of this argument, Licensee presented the sentencing sheet from her criminal case in which she pled guilty to DUI. DOT objected to the sentencing sheet as "hearsay and irrelevant," which the trial court overruled. (Hr'g Tr. at 7, R.R. at 20a.) It appears that after Licensee's counsel suggested that the trial court take judicial notice of this document, (Hr'g Tr. at 7, R.R. at 20a), the trial court essentially acted on that suggestion by reviewing the document and discussing it at length with counsel. Licensee's counsel argued that because: the criminal sentencing sheet indicated that Licensee did not surrender her driver's license; Licensee was fined the mandatory minimum fine of $300; Licensee was sentenced to 48 hours to six months in prison because she had a prior DUI more than 14 years ago in Florida, which prison sentence does not take her out of being sentenced under Section 3804(a)(1); Licensee was ordered to undergo the alcohol safe driving school; and Licensee was ordered to undergo drug and alcohol treatment, (Hr'g Tr. at 10-16, R.R. at 23a-29a), Licensee was clearly sentenced under Section 3804(a)(1) and the DL-21 should have indicated the same, entitling her to the suspension exception under Section 3804(e)(2)(iii).

On November 19, 2010, the trial court issued an Opinion and Order sustaining Licensee's appeal and rescinding the one-year license suspension. The trial court reasoned as follows:

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case and received the 48 hours instead." (R.R. at 25a-27a; Licensee's Br. at 8 n.1.) However, as Licensee points out, which DOT does not contest, Section 3806(b) of the Vehicle Code, 75 Pa. C.S. § 3806(b), provides that the DUI offense at issue here must be considered Licensee's first offense for purposes of her eligibility for the suspension exception under Section 3804(e)(2)(iii) because the Florida offense occurred more than ten years prior to the DUI offense at issue here.

> It is clear from a review of the Sentencing Sheet that Ms. Terna was "subject to the penalties provided in subsection (a)" of § 3804, not § 3804(b)[3] as suggested by DOT. The two principal elements of § 3804(a) are the mandatory minimum sentence of six month[s'] probation under (i) and the fine of $300 under (ii).
>
> Ms. Terna's fine of $300 meets the requirement under (ii). If Ms. Terna had been sentenced under § 3804(b) as DOT suggests, the fine would have to be $500.
>
> The dispute arises with regard to (i) and the mandatory minimum term. DOT argues that since Ms. Terna was sentenced to 48 hours imprisonment, this cannot be a sentence under § 3804(a). This is clearly wrong and has been so decided by the Commonwealth Court in Sivak v. Commonwealth[, 9 A.3d 247 (Pa. Cmwlth. 2010)]. This section only provides for a mandatory minimum term, not a maximum term. A sentence of 48 hours imprisonment does not take this case out of that section.

(Trial Ct. Op. at 2-3, R.R. at 48a-49a.) Subsequently, the trial court entered an opinion pursuant to Pa. R.A.P. 1925(a) in which it considered only the issue of

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[3] Section 3804(b)(1) of the Vehicle Code provides:

> *(b) High rate of blood alcohol; minors; commercial vehicles and school buses and school vehicles; accidents.*—Except as set forth in subsection (c), an individual who violates section 3802(a)(1) where there was an accident resulting in bodily injury, serious bodily injury or death of any person or damage to a vehicle or other property or who violates section 3802(b), (e) or (f) shall be sentenced as follows:
>
> (1) For a first offense, to:
>
> (i) undergo imprisonment of *not less than 48 consecutive hours*;
>
> (ii) pay a fine of not less than *$500* nor more than $5,000;
>
> (iii) attend an alcohol highway safety school approved by the department; and
>
> (iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.

75 Pa. C.S. § 3804(b)(1) (emphasis added).

whether the trial court erred in considering the sentencing sheet from Licensee's criminal case. In that opinion, the trial court concedes that it considered the sentencing sheet from Licensee's criminal case and that it did not admit the sentencing sheet as evidence at the hearing, even though it was discussed with Licensee's counsel. (Trial Ct. 1925(a) Op. at 1.) However, the trial court indicates that the sentencing sheet was a "part of the record of this Court." (Trial Ct. 1925(a) Op. at 2.) The trial court further states that it was unable to determine whether Licensee was subject to the penalties provided in Section 3804(a)(1) based only on the DL-21 because the DL-21 neither contains the details of Licensee's sentence nor indicates whether this was a first offense. (Trial Ct. 1925(a) Op. at 2.) As such, the trial court held that because the sentencing sheet indicates that Licensee was subject to the penalties provided in Section 3804(a)(1), her license should not have been suspended. DOT now appeals to this Court.[4]

On appeal, DOT argues that the trial court erred in sustaining Licensee's appeal because: (1) DOT upheld its prima facie case by submitting and relying on the DL-21; and (2) Licensee failed to offer clear and convincing evidence to rebut DOT's prima facie case establishing that Licensee was convicted of Section 3802(a)(2), was sentenced to prison, and was not subject to the penalties under Section 3804(a)(1).

[4] "Our review is limited 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." Glidden v. Department of Transportation, Bureau of Driver Licensing, 962 A.2d 9, 11 n.1 (Pa. Cmwlth. 2008).

In license suspension cases, the sole issues are whether the licensee was convicted of a crime and whether DOT acted in accordance with applicable law. Glidden v. Department of Transportation, Bureau of Driver Licensing, 962 A.2d 9, 12 (Pa. Cmwlth. 2008). DOT "bears the initial burden to establish a prima facie case that a record of conviction" exists, supports a suspension, and that it acted in accordance with the law. Id. Here, we agree with DOT that under this Court's jurisprudence, DOT has upheld its initial burden by presenting the DL-21, which establishes that Licensee was convicted of a violation of Section 3802(a)(1), Licensee was sentenced to prison, and Licensee was not sentenced under Section 3804(a)(1). As such, the trial court erred in stating that it did not think the DL-21 is a certified record of conviction to support DOT's prima facie burden. However, this error does not mean that the trial court was wrong in sustaining Licensee's appeal because a prima facie case is rebuttable. Licensee may rebut the prima facie case by showing, with clear and convincing evidence, that the record of conviction is erroneous. Glidden, 962 A.2d at 13. "Clear and convincing evidence is '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.'" Id. (quoting Mateskovich v. Department of Transportation, Bureau of Driver Licensing, 755 A.2d 100, 106 n.6 (Pa. Cmwlth. 2000).)

Here, in attempting to rebut the prima facie case, Licensee presented her criminal sentencing sheet, which the trial court relied on in sustaining the appeal. DOT argues that the trial court erred in relying on this document because the trial court was not free to take judicial notice of the contents of the sentencing sheet, which was not admitted into the record as evidence to support Licensee's rebuttal.

In support of its argument that the trial court erred in taking judicial notice of the sentencing sheet, DOT relies on Conchado v. Department of Transportation, Bureau of Driver Licensing, 941 A.2d 792, 794 (Pa. Cmwlth. 2008). In Conchado, the trial court sustained the appeal of the licensee and rescinded the suspension of her driver's license after it, *sua sponte*, took judicial notice of, and relied on, an "uncertified photocopy of what was represented by [Licensee's] counsel to be the sentencing sheet from" the licensee's conviction for conspiracy to possess with intent to deliver, which the trial court held was not a crime for which a suspension is warranted under the Vehicle Code. Id. at 794. The trial court concluded that the certified conviction report from the county clerk of courts stating that the licensee had been convicted of a crime, i.e., possession of drugs, for which her driver's license would be suspended for six months pursuant to Section 1532(c) of the Vehicle Code, 75 Pa. C.S. § 1532(c), was, thus, "erroneous information." Id. On appeal, this Court reversed the trial court's order and held that the trial court erroneously took judicial notice of the purported sentencing sheet. While this Court acknowledged that a "court in appropriate circumstances may take judicial notice of court records," we held that those circumstances do not include an unauthenticated photocopy of a "*disputed document*" that was "not stipulated to be *genuine and accurate*." Id. (emphasis added). Here, unlike in Conchado, DOT objected to the sentencing sheet as hearsay and as irrelevant evidence, which the trial court overruled. (Hr'g Tr. at 7, R.R. at 20a.) DOT did not argue that the trial court could not take judicial notice of Licensee's criminal sentencing sheet, which is part of the trial court's record and which was signed by the President Judge of the trial court, because it was not genuine or accurate. As such, Conchado does not control under the facts of this case.[5]

[5] DOT filed a Motion to Strike Supplemental Reproduced Record (Motion) containing the *(Continued…)*

Because the trial court did not err in taking judicial notice of the sentencing sheet, which is part of the certified record to this Court, we affirm the order of the trial court.

RENÉE COHN JUBELIRER, Judge

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sentencing sheet in Licensee's criminal case because it was not admitted into evidence during Licensee's statutory appeal hearing before the trial court. After a thorough review of the record, we note that Licensee's criminal sentencing sheet is, indeed, part of the certified record to this Court in the form of an attachment to the official hearing transcript. However, because a portion of the supplemental record filed by Licensee at pages 3b-4b does not appear in the certified record to this Court, we will grant DOT's Motion, in part, and strike those pages from the supplemental record.

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	:	
Appellant	:	

O R D E R

NOW, September 27, 2011, the order of the Court of Common Pleas of Montgomery County in the above-captioned matter is hereby **AFFIRMED**. The Motion to Strike Supplemental Reproduced Record (Motion) filed by Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (DOT) is hereby **GRANTED IN PART** to the extent that pages 3b and 4b of Sigma Terna's (Terna) Supplemental Reproduced Record shall be stricken; DOT's Motion is hereby **DENIED IN PART** as to the remainder of Terna's Supplemental Reproduced Record.

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RENÉE COHN JUBELIRER, Judge

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

OPINION NOT REPORTED

CONCURRING OPINION
BY JUDGE McCULLOUGH FILED: September 27, 2011

I agree with the result reached by the Majority as well as the underlying analysis. I write separately because I anticipate continuing appeals involving this issue as a consequence of the manner in which sentencing information is recorded on form DL-21.

We have held that the information set forth on a DL-21 satisfies DOT's prima facie burden of proving that a record of conviction exists and supports a suspension and that DOT acted in accordance with the law. Glidden v. Department of Transportation, Bureau of Driver Licensing, 962 A.2d 9 (Pa. Cmwlth. 2008). Importantly, we have observed that the critical information in a case such as this, that is, whether the licensee was sentenced pursuant to section 3804(a)(1) of the Vehicle Code, 75 Pa. C.S. §3804(a)(1), is a question of law. Dyson v. Department of

Transportation, Bureau of Driver Licensing, 18 A.3d 414, 419 (Pa. Cmwlth. 2011). Nevertheless, as evidenced by our recent decisions, common practice is for the clerks of courts to make this determination and complete the DL-21 form for DOT. See, e.g., Dyson; Sivak v. Department of Transportation, Bureau of Driver Licensing, 9 A.3d 247 (Pa. Cmwlth. 2010); and Glidden. However, the clerk of courts, as a purely ministerial officer, has no discretion to interpret rules and statutes. In re Administrative Order No. 1-MD-2003, 594 Pa. 346, 936 A.2d 1 (1997); Dyson. Because variations in the facts of each case, including negotiated plea agreements, will necessitate further judgment calls and lead to further appeals, I respectfully suggest that this legal determination should be made prior to the completion of the DL-21 and communicated to the clerk of courts.

PATRICIA A. McCULLOUGH, Judge