

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Becky A. Sawyer, :
Appellant :
v. : No. 2753 C.D. 2010
Commonwealth of Pennsylvania, : Submitted: June 24, 2011
Department of Transportation, :
Bureau of Driver Licensing :

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: September 14, 2011

Becky Sawyer (Licensee) appeals an order of the Court of Common Pleas of Cumberland County (trial court) dismissing her statutory appeal of the suspension of her driving privileges for refusing to submit to chemical testing pursuant to Section 1547(b)(1)(i) of the Vehicle Code (Implied Consent Law).¹ Licensee contends that the trial court erred in ruling that her conduct constituted a refusal to submit to chemical testing. Discerning no error, we affirm the order of the trial court.

¹ Section 1547(b)(1)(i) of the Vehicle Code, commonly referred to as the Implied Consent Law, provides, in pertinent part, that 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 department shall suspend the operating privilege of the person . . . for a period of 12 months.” 75 Pa. C.S. §1547(b)(1)(i).

On May 29, 2010, Licensee was arrested for driving under the influence of alcohol (DUI) at a DUI checkpoint by Trooper Timothy Rymer. Upon report that Licensee refused to submit to chemical testing following her arrest, PennDOT suspended Licensee's operating privilege for a period of 12 months, effective August 5, 2010. Licensee filed a statutory appeal to the trial court, and a hearing was held on September 14, 2010.

At the hearing, Licensee stipulated that Trooper Rymer had reasonable grounds for her DUI arrest and that he read the standard warnings verbatim to Licensee from Form DL-26 regarding the consequences of refusing chemical testing. Accordingly, the trial court focused the proceedings on whether Licensee's conduct following her arrest constituted a refusal.

PennDOT presented the testimony of Trooper Rymer, who confirmed that he read the warnings on Form DL-26 aloud to Licensee at the booking center. Licensee stated that "she understood [the warnings] but she wanted to talk to a lawyer." Notes of Testimony, 9/14/10, at 9 (N.T. ____). The trooper reiterated and paraphrased the warning that a licensee does not have the right to consult an attorney before deciding whether to submit to chemical testing. Trooper Rymer then asked Licensee, "Are you or are you not going to give blood?" N.T. 7. Licensee responded that she did not have a problem with taking the test but wanted to talk to an attorney first. According to Trooper Rymer, he informed Licensee three or four times that she had no right to talk to a lawyer before she gave a blood sample. Trooper Rymer explained to Licensee that if she did not consent, she would lose her license. The trooper testified that Licensee "just kept saying, I want to talk to a lawyer." N.T. 26.

Trooper Rymer testified that a phlebotomist then came to take Licensee to a different room in order to draw a blood sample. Although Trooper Rymer considered Licensee's conduct a refusal, he allowed Licensee to go with the phlebotomist because he thought that "maybe she would give blood." *Id.* The trooper informed the phlebotomist that Licensee was asking for an attorney. The phlebotomist responded that she would videotape her interaction with Licensee.² Trooper Rymer did not accompany Licensee to the testing room. The phlebotomist returned a short time later and informed Trooper Rymer that Licensee was "still asking for an attorney before she gives blood." N.T. 10.

Licensee testified that the intake room of the booking center was noisy and that she could not hear well when Trooper Rymer read the DL-26 form. According to Licensee, when the trooper asked if she understood the warnings, she responded, "no, I couldn't hear." N.T. 18. At that point, Licensee stated that she discussed her military service in Iraq with the trooper. Licensee testified that there was no further discussion of the chemical test refusal warnings.

Licensee did not recall telling Trooper Rymer that she wanted to speak to an attorney. Rather, Licensee stated that the first time she mentioned talking with a lawyer was "on the tape," *i.e.*, during her conversation with the phlebotomist. Licensee further testified that the phlebotomist never asked her whether or not she would consent to the blood test. According to Licensee, Trooper Rymer was in the room at the time of her videotaped interaction with the

² At the conclusion of Trooper Rymer's testimony, the video recording of Licensee's interaction with the phlebotomist was offered into evidence and viewed by the trial court. Licensee stipulated to the veracity of the video.

phlebotomist. Licensee explained that she wanted to take the blood test; however, she did not understand the warnings.

PennDOT recalled Trooper Rymer to clarify portions of Licensee's testimony. Trooper Rymer testified that his discussion with Licensee about her military service occurred at the time of her arrest. He recalled that Licensee was angry and felt she should not be arrested because she had recently returned from Iraq. Trooper Rymer contradicted Licensee's claim that the booking center was noisy, stating that there was "only one other person at that time being booked through the booking center ." N.T. 25.

The trial court found Trooper Rymer's testimony to be credible. The trial court determined that Licensee's testimony was not credible, particularly where her testimony contradicted that of Trooper Rymer. Based upon the evidence adduced at the hearing, the trial court made the following findings:

The trooper read the chemical test warnings from form DL-26 verbatim. Paragraph 4 provides in relevant part as follows:

It is also my duty as a police officer 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 . . . will constitute a refusal. . .**

(emphasis added). [Licensee's] continued insistence upon conferring with counsel before agreeing to submit to a blood test amounted to a refusal. *Department of Transportation v. O'Connell*, 521 Pa. 242, 252, 555 A.2d 873, 878 (1989). Giving her the chance to submit to the test by turning her over to the phlebotomist was merely gratuitous. *Olbrish v. Commonwealth Dept. of Transportation*, 619 A.2d 397 (Pa. Cmwlth. 1992). It conferred no "property right to have a test administered after the initial refusal. . . ." *Id.* at 399. Absent a

properly administered test, her refusal could not be considered to have been waived.

Trial Court Opinion at 3-4. The trial court dismissed Licensee's statutory appeal. Licensee now appeals to this Court.³

On appeal, Licensee argues that her conduct at the booking center did not constitute a refusal. Licensee contends that if her responses to Trooper Rymer constituted a refusal, that refusal was vitiated when he sent her with the phlebotomist for a blood test. PennDOT counters that Licensee's multiple post-warning requests to speak with an attorney and her ultimate failure to provide a blood sample constitute a refusal under the Implied Consent Law.

To sustain a 12-month suspension of a licensee's operating privileges, the Department must establish that the licensee: (1) was arrested by a police officer who had reasonable grounds to believe that the licensee was operating the vehicle while under the influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was specifically warned that refusal would result in a license suspension. *Quick v. Department of Transportation, Bureau of Driver Licensing*, 915 A.2d 1268, 1271 (Pa. Cmwlth. 2007). Any response from a licensee that is less than an unqualified, unequivocal assent to a chemical test constitutes a refusal. *Hudson v. Department of Transportation, Bureau of Driver Licensing*, 830 A.2d 594, 599 (Pa. Cmwlth. 2003). A licensee's refusal need not be expressed in words; a licensee's conduct may constitute a refusal to submit to

³ This Court's scope of 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. *Finnegan v. Department of Transportation, Bureau of Driver Licensing*, 844 A.2d 645, 648 n.3 (Pa. Cmwlth. 2004).

testing. *Id.* Questions of credibility are for the trial court. *O'Connell*, 521 Pa. at 248, 555 A.2d at 875.

The trial court found that Licensee's responses to Trooper Rymer after he read her the warnings constituted a refusal to submit to testing. The trial court cited paragraph 4 of the DL-26 form, which was read verbatim to Licensee; it provides, in relevant part:

Any request to speak to 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 . . .

Form DL-26 (8-06); Commonwealth's Exhibit 1, at #2 (emphasis added). We agree with the trial court that Licensee's repeated requests to speak to an attorney after the warnings were read to her constituted a refusal to submit to chemical testing.

Licensee further argues that, if she refused to consent to Trooper Rymer's request, that refusal was vitiated by his act of sending Licensee to a blood test. PennDOT counters that Trooper Rymer allowed Licensee an opportunity to take the test after she had already refused, and that this gratuitous offer could be revoked at any time unless and until Licensee provided a blood sample. We agree.

In *Olbrish*, 619 A.2d at 398, the licensee failed to produce an adequate breath sample, which was deemed a refusal. Nevertheless, the arresting officer offered the licensee an opportunity to take a blood test. Once transported to the hospital, the licensee refused to sign a hospital waiver form and the hospital would not draw his blood. The licensee argued that the officer's action in allowing him to take the second test constituted a waiver of his initial deemed refusal. This Court held that no waiver of refusal occurred, explaining that the officer's offer

was “at most gratuitous and could be revoked at any time before the test was administered.” *Id.* at 399 n.3. We further explained that

[w]here there is a refusal and the police then gratuitously offer a second test *which the licensee successfully completes*, a waiver of the first refusal may occur.

Id. (emphasis in original).

Here, Licensee’s multiple post-warning requests to speak with an attorney constituted a refusal. In spite of her refusal, Trooper Rymer gratuitously allowed Licensee an additional opportunity to provide a blood sample. Licensee did not provide a blood sample, instead telling the phlebotomist that she wanted to speak to an attorney. A waiver of Licensee’s first refusal could have occurred only if Licensee had successfully completed the blood test. *Id.* Absent a successfully completed chemical test, Licensee’s refusal was not waived. The trial court did not err in dismissing Licensee’s appeal.

For the foregoing reasons, we affirm.

MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 14th day of September, 2011, the order of the Court of Common Pleas of Cumberland County dated December 1, 2010, in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge