

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Frederick Karash, :  
Appellant :  
v. : No. 304 C.D. 2011  
Commonwealth of Pennsylvania, : Submitted: May 20, 2011  
Department of Transportation, :  
Bureau of Driver Licensing :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: June 22, 2011

Frederick Karash (Licensee) appeals from the November 23, 2010, order of the Court of Common Pleas of Erie County (trial court), which denied Licensee's challenge to the Department of Transportation's (DOT) suspension of his operating privileges under section 1547(b)(1) of the Vehicle Code (Code).<sup>1</sup> We affirm.

On July 10, 2010, Officer Craig Gourley stopped Licensee's vehicle because one of the headlights was out. The officer detected the odor of an alcoholic beverage emanating from the vehicle. The officer also noticed that Licensee had slurred speech, had alcohol on his breath, had to use both arms to support himself

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<sup>1</sup> 75 Pa. C.S. §1547(b)(1). Section 1547(b)(1) of the Code authorizes DOT to suspend a person's operating privileges for refusing to submit to chemical testing.

upon exiting the vehicle and was unsteady on his feet. The officer contacted Officer Michael Sliker for assistance.

Officer Sliker administered several field sobriety tests. With respect to the walk-and-turn test, Licensee performed poorly. He continuously raised his arms from his side, lost his balance, raised his arms above his head, was heavy-footed and stopped to question the procedure while making the turn. With respect to the one-leg-stand test, Licensee was off balance. Licensee refused to submit to the horizontal-gaze nystagmus test and the portable breath test. Licensee then requested a blood test. During the field tests, Officer Sliker noticed that Licensee had watery and bloodshot eyes, had an odor of alcohol emanating from his breath, spoke with slurred speech, swayed when standing straight and was unstable while walking. Based on his observations and the field test results, Officer Sliker placed Licensee under arrest for driving under the influence of alcohol.

At the police station, Officer Sliker took Licensee to a room where a paramedic had prepared to administer a blood test. Officer Sliker read Licensee the chemical test warnings from the DL-26 form. Licensee, however, stated that he did not understand them. Officer Sliker read the warnings a second time, but Licensee once again stated that he did not understand. Officer Sliker gave Licensee two minutes to read the warnings. Licensee then asked if he could refer to the Code. Officer Sliker believed that Licensee was stalling and recorded that Licensee refused to submit to chemical testing.

As a result, DOT suspended Licensee's operating privileges for one year. Licensee appealed to the trial court, which held a hearing on the matter. At the hearing, Licensee asserted that he did not understand the warnings, and, under *McDonald v. Department of Transportation, Bureau of Driver Licensing*, 708 A.2d 154 (Pa. Cmwlth. 1998), where a licensee is confused, ten to fifteen minutes of questioning does not constitute a refusal. However, the trial court believed that Licensee was intentionally stalling, not that Licensee was confused. Thus, the trial court denied Licensee's challenge. Licensee now appeals to this court.<sup>2</sup>

Licensee argues that the trial court erred in failing to conclude that, because Licensee was confused, Licensee's two minutes of questioning did not constitute a refusal. We disagree.

In *McCloskey v. Department of Transportation, Bureau of Driver Licensing*, 722 A.2d 1159 (Pa. Cmwlth. 1999), this court limited the holding in *McDonald* to those cases where the trial court believes the licensee's testimony that he or she was confused. This court pointed out that questions of credibility and conflicts in the evidence are for the trial court. *Id.* at 1163. Because the trial court believed that the licensee in *McCloskey* was stalling, not that the licensee was confused, this court did not disturb the trial court's finding. *Id.* Here, as in *McCloskey*, the trial court believed that Licensee was stalling, not that Licensee was confused. Thus, Licensee cannot prevail.

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<sup>2</sup> Our scope of review is limited to determining whether the trial court committed an error of law or an abuse of discretion and whether the trial court's findings are supported by substantial evidence. *McDonald*, 708 A.2d at 155.

Accordingly, we affirm.<sup>3</sup>

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ROCHELLE S. FRIEDMAN, Senior Judge

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<sup>3</sup> Licensee also argues that the testimony of the police officers at the suspension hearing differed from their testimony at Licensee's preliminary hearing. However, the transcript of the officers' preliminary hearing testimony is not part of the record before this court. Therefore, we may not consider this claim.

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Department of Transportation,	:	
Bureau of Driver Licensing	:	

ORDER

AND NOW, this 22nd day of June, 2011, the order of the Court of Common Pleas of Erie County, dated November 23 2010, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Senior Judge