

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Linda Donofrio,	:	
	:	
Appellant	:	
	:	
v.	:	No. 309 C.D. 2011
	:	
Commonwealth of Pennsylvania,	:	Submitted: July 29, 2011
Department of Transportation,	:	
Bureau of Driver Licensing	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: September 23, 2011**

Linda Donofrio (Licensee) appeals an order of the Court of Common Pleas of Montgomery County (trial court) that denied her statutory appeal from a one-year suspension of her operating privilege pursuant to Section 1547(b)(1) of the Vehicle Code, commonly known as the Implied Consent Law.<sup>1</sup> The Department of Transportation, Bureau of Driver Licensing (Department) suspended Licensee’s operating privilege as a result of her refusal to submit to chemical breath testing. Licensee contends the trial court erred in excluding medical testimony regarding her alleged incapacity to perform the breath test. Upon review, we affirm.

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<sup>1</sup> Section 1547(b)(1) requires any person placed under arrest for driving under the influence (DUI) “to submit to chemical testing ... [and if that person] refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person ... for a period of 12 months.” 75 Pa. C.S. §1547(b)(1)(i).

## **I. Background**

The Department notified Licensee of the one-year suspension of her operating privilege based on her refusal to submit to chemical testing after her arrest for driving under the influence (DUI). Licensee appealed the suspension to the trial court.

The trial court held a hearing at which the Department presented two witnesses, Trooper Michael Brubaker and Corporal Richard Schroeter. Trooper Brubaker arrested Licensee for DUI, transported her for chemical breath testing, and recited the Implied Consent warnings. Corporal Schroeter, who was Trooper Brubaker's shift supervisor and a certified breath test operator, administered the breath test.

Trooper Brubaker testified regarding the circumstances of Licensee's arrest and the events surrounding the testing. Trooper Brubaker testified he observed Licensee's vehicle swerve over the double yellow lines and nearly hit a telephone pole. When he stopped Licensee's vehicle, he smelled a strong odor of alcohol and observed glassy, bloodshot eyes. Licensee advised him she drank wine earlier that evening. Trooper Brubaker testified that, when asked, Licensee reported she did not suffer from any medical conditions, and as a former fitness trainer she could participate in any tests he administered. Based on her performance in a few field sobriety tests, Trooper Brubaker placed Licensee under arrest for DUI.

Trooper Brubaker then transported Licensee to the Skippack Township Police Barracks for testing. After a 20-minute observation period, he

read the warnings on the form DL-26, Chemical Testing and Refusal Report (Warning) which states in pertinent part:

You have no right to speak with an attorney or anyone else before deciding whether to submit to testing. ***If you request to speak with an attorney or anyone else after being provided these warnings*** or you remain silent when asked to submit to chemical testing, ***you will have refused the testing***, resulting in suspension of your operating privilege and other enhanced criminal sanctions if you are convicted of violating Section 3802(a) of the Vehicle Code.

Ex. C-1, Warning No. 4, (emphasis supplied). There is no dispute that Trooper Brubaker read the Warning “word for word” in its entirety. Reproduced Record (R.R.) 11a.

Corporal Schroeter testified that when he administered the test, Licensee did not blow a steady breath as instructed and kept starting and stopping, and blowing to the side of the mouthpiece. Licensee did not provide an adequate breath sample, and the two minutes allotted for the test timed out after her first attempt.<sup>2</sup> Corporal Schroeter testified that “throughout the whole test,” about 20 times, Licensee requested to speak to her attorney and her husband. R.R. 27a-28a. Corporal Schroeter asked Trooper Brubaker to take her for a blood sample when he thought “she’s not going to do this.” R.R. 27a. Licensee asked him to “give [her] another chance.” Id. To accommodate her request, Corporal Schroeter testified he started up the machine to let her try again.

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<sup>2</sup> Department regulations require two consecutive actual breath tests to be valid. 67 Pa. Code § 77.24; see also Dep’t of Transp., Bureau of Driver Licensing v. Schraf, 581 A.2d 249 (Pa. Cmwlth. 1990).

During her second attempt, Licensee again repeatedly asked to call her husband or attorney. Corporal Schroeter deemed this a delay tactic, and at this time he recorded the test as a refusal. During his testimony, Corporal Schroeter confirmed Licensee did not disclose asthma or any other condition that would prevent her from performing a breath test. During cross-examination, Corporal Schroeter testified:

I have probably administered six, 700 breath tests, total. I can tell when somebody's trying to defeat the instrument and I can tell when somebody's not able to.

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I was convinced that she was trying to defeat the instrument by not providing a proper sample.

R.R. 31a-32a. He emphasized Licensee could not provide a sufficient sample “because she kept stopping,” and “not because she couldn't do it. She wasn't out of breath when she stopped. She wasn't panting for air.” R.R. 33a-34a.

As her sole witness, Licensee presented Dr. Joseph Citron to testify as a medical expert regarding breath tests and related medical conditions. The Department objected to his testimony as irrelevant because Licensee's documented refusal of chemical testing was unrelated to a medical condition. R.R. 46a-47a.

Dr. Citron specializes in ophthalmology, and he did not treat or examine Licensee in preparation for his testimony or report. Based on the medical records of others that he reviewed, Dr. Citron testified that Licensee has asthma. The trial court noted Dr. Citron did not examine Licensee, although he could have, and he relied on medical tests that were “fairly old.” R.R. 54a. The trial court

ended Dr. Citron's testimony and rejected it. Licensee presented no other witnesses and declined to testify.

Ultimately, the trial court found Licensee did not prove an inability to take the test and agreed with the Department that Licensee's repeated requests to speak with her husband and attorney constituted a refusal. Thus, the trial court denied Licensee's appeal.

Licensee now appeals to this Court,<sup>3</sup> asserting the trial court erred in excluding the medical testimony of Dr. Citron proffered to show an unknown medical condition, asthma, rendered Licensee incapable of performing the breath test. Licensee also contends there is insufficient evidence to support suspension.

## **II. Discussion**

To sustain a license suspension under the Implied Consent Law, the Department must establish a licensee: (1) was arrested for DUI; (2) was asked to submit to a chemical test (*e.g.*, breath test); (3) refused to do so; and (4) was specifically warned a refusal would result in suspension of her driver's license. See Quigley v. Dep't of Transp., Bureau of Driver Licensing, 965 A.2d 349 (Pa. Cmwlth. 2009). Here, the trial court concluded the Department met its burden of proving each element to support a license suspension.

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<sup>3</sup> Our review is limited to determining whether the trial court committed error of law or abused its discretion and whether necessary findings of fact were supported by substantial evidence. Reinhart v. Dep't of Transp., Bureau of Driver Licensing, 946 A.2d 167 (Pa. Cmwlth. 2008).

Once the Department meets its burden, the burden shifts to the licensee to prove her refusal was not knowing or conscious, or that she was physically incapable of performing the test. Dep't of Transp., Bureau of Driver Licensing v. Ingram, 538 Pa. 236, 648 A.2d 285 (1994). Here, the trial court determined Licensee did not prove her physical inability to complete the test due to a medical condition and noted that any evidence related to her alleged incapacity would have been irrelevant because her refusal resulted from her conduct.

### **A. Refusal by Conduct**

This Court consistently holds that anything substantially less than an unqualified, unequivocal assent to submit to chemical testing constitutes a refusal. Gregro v. Dep't of Transp., Bureau of Driver Licensing, 987 A.2d 1264 (Pa. Cmwlth. 2010); Dep't of Transp., Bureau of Driver Licensing v. Mumma, 468 A.2d 891 (Pa. Cmwlth. 1983). Significantly, a licensee's conduct may constitute a refusal to submit to testing. Quick v. Dep't of Transp., Bureau of Driver Licensing, 915 A.2d 1268 (Pa. Cmwlth. 2007); Keenan v. Dep't of Transp., Bureau of Driver Licensing, 657 A.2d 134 (Pa. Cmwlth. 1995) (licensee's repeated questioning deemed a refusal). Further, failure to submit a sufficient breath sample "is a refusal *per se* unless the licensee can establish that the failure was due to physical inability unrelated to ingestion of alcohol..." Spera v. Dep't of Transp., Bureau of Driver Licensing, 817 A.2d 1236, 1240 (Pa. Cmwlth. 2003).

Here, the trial court did not err in finding Licensee's conduct constituted a refusal, and sufficient evidence supports this conclusion. See Keenan. Specifically, the trial court found that Corporal Schroeter marked the breath test

“refused” due to Licensee’s conduct in repeatedly requesting to speak to her husband or her attorney. R.R. 27a-28a, 47a (“I think that the refusal comes in that second test situation.”). The Warning read to Licensee specifies that asking to call an attorney or any person is a refusal and shall be marked as such. R.R. 28a; see Quigley (refusal recorded since licensee requested to speak to her husband).

Corporal Schroeter deemed Licensee’s conduct in repeatedly making these requests a “delay tactic” and found her failure to provide a sufficient breath sample constituted a deliberate attempt to defeat the test. R.R. 31a-32a. Licensee submitted no evidence to contradict the Department’s evidence regarding her conduct. As to Licensee’s alleged inability to provide sufficient breath, the Corporal’s testimony is clear that Licensee did not provide sufficient breath not because she could not, but because she kept stopping. R.R. 33a-34a. The trial court credited his testimony. R.R. 44a, 56a. This too is a refusal. See Spera.

In short, the trial court properly concluded Licensee refused chemical testing by repeatedly asking to speak to her husband and attorney. See Quigley; Keenan.

### **B. Evidence of Alleged Incapacity**

Nevertheless, Licensee argues the trial court’s preclusion of Dr. Citron’s testimony denied her an opportunity to present her defense of alleged incapacity to give a sufficient breath sample due to asthma, and thus constitutes reversible error. Wright v. Dep’t of Transp., Bureau of Driver Licensing, 788 A.2d 443 (Pa. Cmwlth. 2001) (incapacity defense must be supported by medical

evidence). Licensee proffered Dr. Citron as an expert in “evidentiary breath testing, standard field sobriety and medical conditions related thereto.” R.R. 38a.

The admission of expert testimony is within the discretion of the trial court, and this Court will not disturb the trial court’s decision absent a clear abuse of discretion. Dep’t of Transp., Bureau of Driver Licensing v. Wilhelm, 626 A.2d 660, 662 (Pa. Cmwlth. 1993); Wicks v. Dep’t of Transp., Bureau of Driver Licensing, 590 A.2d 832 (Pa. Cmwlth. 1991). “Abuse of discretion” means the “judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record.” Bedford Downs Mgmt. Corp. v. State Harness Racing Comm’n, 592 Pa. 475, 487, 926 A.2d 908, 916 (2007).

Here, the trial court exercised its discretion to discontinue the testimony of Licensee’s expert medical witness, Dr. Citron. We discern no abuse of discretion by the trial court for several reasons. First, Dr. Citron did not offer any independent medical opinion as to Licensee’s alleged medical condition based upon the records he reviewed. Next, Licensee failed to make an offer of proof or suggest during the hearing that Dr. Citron would testify that Licensee lacked awareness of her alleged medical condition. Finally, Dr. Citron’s testimony was irrelevant to, and cannot excuse Licensee’s non-medically related refusal.

Dr. Citron testified Licensee had asthma based solely on medical records of others that he reviewed. The trial court noted the studies Dr. Citron read from were “fairly old” and rejected his testimony as he did not examine Licensee. After hearing Dr. Citron’s testimony regarding asthma, the trial court found that, as



an expert, Dr. Citron did not offer any independent opinion. Tr. Ct., Slip Op. at 3. While an expert's testimony may rely on his review of medical records of others, an expert cannot merely parrot others' findings and be credited. See Collins v. Cooper, 746 A.2d 615 (Pa. Super. 2000).

Licensee challenges the trial court's reliance upon Papach v. Mercy Suburban Hospital, 887 A.2d 233 (Pa. Super. 2005) (ambulance report inadmissible) to reject Dr. Citron's testimony. However, Papach involved the admissibility of a report, while the current issue involves the competence and relevance of an expert opinion. Ultimately, the trial court rejected Dr. Citron's testimony because he did not offer any independent opinion on Licensee's medical condition or any opinion on Licensee's awareness of a medical condition.

Importantly, during the hearing Licensee never offered to prove that she lacked awareness of her alleged medical condition at the time of the testing. This evidentiary gap, noted by the trial court, bars Dr. Citron's testimony. Tr. Ct., Slip. Op. at 3.

Medical testimony regarding alleged asthma cannot be considered by a court when a licensee does not disclose the condition at the time of testing. See Finney v. Dep't of Transp., Bureau of Driver Licensing, 721 A.2d 420 (Pa. Cmwlth. 1998). There is no dispute that Licensee did not inform either Trooper Brubaker or Corporal Schroeter of her alleged asthma. R.R. 8a, 35a. Licensee had a duty to inform these officers of any medical condition that may affect the testing, or be barred from a medical incapacity defense. Id.; Hatelski v. Dep't of Transp., Bureau of Driver Licensing, 666 A.2d 386 (Pa. Cmwlth. 1995). The only

circumstance that may excuse this duty is when the medical condition is unknown to the licensee, as in Bridges v. Department of Transportation, Bureau of Driver Licensing, 752 A.2d 456 (Pa. Cmwlth. 2000), relied on by Licensee.

Bridges presents an anomaly in that this Court permitted evidence regarding medical incapacity despite the licensee's failure to disclose a condition to the testing officers because the record showed a pulmonary condition that could affect testing was unknown to the licensee. Significantly, in Bridges, the officer marked the test "refused" because the licensee was unable to provide an adequate breath sample. Since the officer recorded the licensee's test as a refusal due to insufficient breath, the trial court accepted deposition testimony by a physician who observed the licensee's pulmonary limitations, pertinent because the doctor causally linked the medical condition to the refusal in order to excuse it.

The crucial facts in Bridges differ from those present here. This is not a case in which the officers recorded Licensee's test as a refusal due to insufficient breath. In stark contrast to Bridges, Corporal Schroeter marked the test "refused" for the non-medically related cause of Licensee repeatedly asking to call her attorney or husband. Given these distinguishing facts, Bridges does not apply.

We agree with the trial court that Dr. Citron's medical testimony is irrelevant. Licensee's test was marked as "refused" because she repeatedly asked to speak to her husband or attorney. Medical testimony is not relevant when the refusal is not medically-related. Licensee failed to connect her alleged medical condition to the refusal recorded, and offered no evidence to show her continued request to speak with her husband or attorney was excused by any medical

condition. Licensee's failure to connect her alleged medical condition to her refusal thwarts a medical incapacity defense.

Accordingly, and for the above reasons, the decision of the trial court sustaining Licensee's one-year suspension is affirmed.

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ROBERT SIMPSON, Judge

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Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing	:	

**ORDER**

**AND NOW**, this 23<sup>rd</sup> day of September, 2011, the Order of the Court of Common Pleas of Montgomery County is **AFFIRMED**. The stay of the one-year license suspension is hereby dissolved.

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ROBERT SIMPSON, Judge