IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kim R. Benjamin, Appellant	:	
v.	:	No. 567 C.D. 2011
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing	:	Submitted: September 30, 2011

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: November 14, 2011

Kim R. Benjamin (Licensee) appeals from the February 15, 2011, order of the Court of Common Pleas of Centre County (trial court) dismissing his appeal from the one-year suspension of his operating privilege by the Department of Transportation, Bureau of Driver Licensing (DOT), pursuant to Section 1547(b)(1)(i) of the Vehicle Code[1] for refusing to submit to chemical testing. We affirm.

[1] 75 Pa. C.S. §1547(b)(1)(i). Section 1547(b)(1)(i) provides, in pertinent part, as follows:

(b) Suspension for refusal.—

(1) If any person placed under arrest for a violation of section 3802 [relating to driving under the influence of alcohol or controlled

(Continued....)

On November 10, 2010, DOT mailed Licensee an Official Notice of Suspension of Driving Privilege for the October 26, 2010, violation of Section 1547(b)(1)(i) of the Vehicle Code, which Licensee timely appealed. A *de novo* hearing was held before the trial court on February 15, 2011, at which Licensee testified on his own behalf and DOT presented the testimony of the arresting officer, Matthew Shupenko. Based on the evidence presented, the trial court dismissed Licensee's appeal and reinstated the suspension. Licensee timely appealed the trial court's order[2] and the trial court ordered Licensee to file a Concise Statement of Matters Complained of on Appeal (Concise Statement) pursuant to Pa.R.A.P. 1925(b). Licensee complied and set forth the following two issues in the Concise Statement: (1) whether Officer Shupenko discharged his duty to convey the certainty of the license suspension when the officer stated to Licensee that his license "could" or "probably would" be suspended; and (2) whether Officer Shupenko properly required Licensee to execute an exculpatory hospital form as a condition of consenting to chemical testing.

In an opinion in support of its February 15, 2011, order, the trial court found that Officer Shupenko read aloud, verbatim, all four paragraphs of the DL-26 Form when the form was presented to Licensee at the time the officer requested that Licensee submit to chemical testing.[3] Trial Court Op. at 2. The trial court found that

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> substance] is requested to submit to chemical testing and 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 as follows:
>
> (i) . . . .for a period of 12 months.

[2] Licensee originally filed his appeal with the Superior Court which transferred the appeal to this Court by order filed March 31, 2011.

[3] The DL-26 Form contains the chemical test warnings required by Section 1547 of the

(Continued....)

Officer Shupenko read aloud the beginning sentence of paragraph three of the DL-26 Form, which provides that: "If you refuse to submit to the chemical test, your operating privilege will be suspended for at least 12 months." Id. Accordingly, the trial court concluded that Officer Shupenko did convey the certainty of license suspension if Licensee did not submit to chemical testing. Id.

The trial court stated that it did not completely understand Licensee's arguments with respect to the second issue raised in the Concise Statement. Trial Court Op. at 3. However, the trial court found that while Licensee refused to sign the DL-26 Form, he did sign a hospital authorization form wherein he checked the box indicating that he did not authorize the withdrawal of a blood sample. Id. Therefore, the trial court concluded that neither Licensee's words nor his actions, in any way, expressed an unequivocal, unqualified assent to chemical testing. Id.

It is now a well settled rule of law that in order to sustain a license suspension under Section 1547 of the Vehicle Code, DOT must prove that: (1) the licensee was arrested for driving under the influence of alcohol or controlled substance in violation of Section 3802 of the Vehicle Code, 75 Pa. C.S. §3802; (2) the police officer had reasonable grounds to believe that the licensee was operating a vehicle while in violation of Section 3802; (3) the licensee was asked to submit to a chemical test; (4) the licensee refused to do so; and (5) the police officer fulfilled the duty imposed by Section 1547 of the Vehicle Code by advising the licensee that his operating privilege would be suspended if he refused to submit to chemical testing. Martinovic v. Department of Transportation, Bureau of Driver Licensing, 881 A.2d 30, 34 (Pa. Cmwlth. 2005). Once DOT meets its burden, it is the licensee's

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Vehicle Code, 75 Pa. C.S. §1547. These warnings are also known as "implied consent warnings."

responsibility to prove that he was not capable of making a knowing and conscious refusal to take the chemical test. Id.

Before this Court, Licensee first sets forth in the argument section of his brief, several findings of fact that he has gleaned from the testimony presented at the February 15, 2011, hearing before the trial court. However, our scope of review in a license suspension case is confined 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. Department of Transportation, Bureau of Driver Licensing v. Ingram, 538 Pa. 236, 648 A.2d 285 (1994) (emphasis added). Questions of credibility and conflicts in the evidence presented are for the trial court to resolve. Id. If there is sufficient evidence in the record to support the findings of the trial court we must pay proper deference to it as fact finder and affirm. Id.

Licensee contends that Officer Shupenko did not discharge his duty to convey the certainty of the license suspension. Licensee asserts that when he asked Officer Shupenko whether the license suspension would be obviated if Licensee was ultimately found not guilty of the underlying DUI, the officer replied that Licensee's licensee "could" or "probably would" be suspended. Licensee recognizes that police officers have no duty to explain the implied consent warnings to a licensee or determine whether the licensee understands the law. However, Licensee argues that the warnings read to him by Officer Shupenko from the DL-26 Form were negated by the gratuitous, equivocal information the officer later provided Licensee in response to Licensee's question. Licensee contends that when Officer Shupenko chose to answer Licensee's question, the officer had an affirmative duty to correctly and unequivocally respond that a not guilty verdict in the criminal case would have

absolutely no effect whatsoever on the suspension for failure to submit to chemical testing.[4] As support for his arguments, Licensee cites to this Court's decisions in Department of Transportation, Bureau of Driver Licensing, Osborne, 580 A.2d 914 (Pa. Cmwlth. 1990) and Zaleski v. Department of Transportation, Bureau of Driver Licensing, 22 A.3d 1085 (Pa. Cmwlth. 2011).

In Osborne, the arresting officer, after giving the licensee the proper implied consent warnings, informed the licensee that he could get a special work permit to drive to and from work during the suspension of his license. Osborne, 580 A.2d at 916. The trial court sustained the licensee's appeal and this Court affirmed on appeal. Id. at 915-16. We agreed with the trial court's determination that the arresting officer's statement about the availability of a special license created confusion which prevented the licensee from making a knowing and conscious refusal. Id. at 916. In addition, we declined to adopt DOT's position that once a warning under Section 1547 is properly given to a licensee, any subsequent misinformation given to the licensee is harmless. Id.

In Zaleski, the arresting officer, prior to any attempt to administer a blood alcohol test to the licensee, received a personal phone call from another police officer in a different municipality requesting that the arresting officer advise the licensee to refuse the blood test. Zaleski, 22 A.3d at 1086. The arresting officer then informed the licensee that he could not offer any legal advice and that the licensee

[4] Licensee contends that this matter needs to be remanded because the trial court failed to make specific findings as to his level of confusion and his ability, under the totality of the circumstances, to make a knowing and conscious decision to refuse chemical testing. We reject Licensee's contention. While the trial court did not make detailed findings, a review of the trial court's opinion reveals that the court made the findings necessary to resolve the issues raised in Licensee's Concise Statement. Therefore, we see no need to remand this matter for additional findings as proposed by Licensee.

would be read the required chemical test warnings prior to making any decision as to whether to submit to a blood alcohol test. Id. at 1087. The arresting officer further advised the licensee that the other police officer had advised that the licensee refuse the chemical testing. Id. The arresting officer then read, verbatim, the implied consent warnings set forth on the DL-26 Form as required by Section 1547 of the Vehicle Code. Id. The licensee refused to submit to chemical testing. Id. The licensee gave no indication that he did not understand the warnings and signed the DL-26 Form acknowledging his understanding of the consequences of a refusal. Id. The trial court found the arresting officer's testimony more credible than the licensee's testimony and dismissed the licensee's appeal. Id. On appeal, the licensee urged this Court to follow Osborne and hold that sufficient confusion was created, by the relaying of the other police officer's advice not to submit to the blood test, to render the licensee's refusal to submit to chemical testing not knowing and not conscious. Id. at 1088. We affirmed on the basis of the trial court's finding that the licensee's testimony regarding his confusion was not credible. Id.

Herein, the trial court found that Officer Shupenko read aloud, verbatim, all four paragraphs of the DL-26 Form and in so doing, the officer specifically read the beginning sentence of paragraph 3, which states that "[i]f you refuse to submit to the chemical test, your operating privilege will be suspended for at least 12 months." Trial Court Op. at 2. Thus, the trial court correctly found that Licensee was properly warned, in no uncertain terms, as to the consequences of his refusal to submit to chemical testing. Officer Shupenko testified that after he read the warnings to Licensee and after Licensee read through the DL-26 Form for about five minutes, Licensee asked whether his license still would be suspended if he was found not guilty of the DUI. Hr'g Tr. at 16, Reproduced Record (R.R.) at 29a. Officer

Shupenko testified that he responded: "And I said I wasn't exactly sure but as far as I understood because it was a separate civil penalty, whatever happened in criminal court had no bearing on the license suspension." Id. The trial court found this testimony credible and rejected Licensee's assertion that Officer Shupenko's response rendered his refusal unknowing and unconscious. Trial Court Op. at 2. We can discern no error in the trial court's determination based on Osborne or Zaleski.

Unlike the arresting officer in Osborne, Officer Shupenko did not give Licensee inaccurate information after reading, verbatim, the warnings on the DL-26 Form. Although Officer Shupenko stated that he was not sure, he did not inform Licensee that his licensee would not be suspended if he was found not guilty. To the contrary, Officer Shupenko correctly informed Licensee that the license suspension was a separate civil penalty and whatever happened in criminal court had no bearing on the license suspension. In addition, like Zaleski, the trial court did not find Licensee's testimony credible that he was confused. More importantly, the transcript of Licensee's testimony before the trial court on February 15, 2011, reveals that Licensee did not even mention that he was confused by Officer Shupenko's response to his question regarding what would happen to his license suspension if he were found not guilty of the DUI. Hr'g Tr. at 43-48, R.R. at 56a-61a. Instead, Licensee testified that Officer Shupenko did not read the warnings on the DL-26 Form to him and that he was confused as to why he was "being asked to give blood after having given breath [at the scene] and this form has been presented and I'm just not comfortable." Id.

Accordingly, we reject Licensee's contention that Officer Shupenko's response to his question regarding what effect a not guilty verdict would have on his

license suspension negated the warnings read to him by Officer Shupenko from the DL-26 Form.

Next, Licensee argues that the trial court failed to fully appreciate the significance of the hospital authorization form under the particular facts of this case.[5] Licensee argues that requiring him to sign a form, of whatever nature, in order to consent to chemical testing is beyond the parameters of Section 1547 of the Vehicle Code, which does not require a licensee to complete any pre-test procedure. Licensee argues that he did not verbally refuse to take the chemical test but rather he refused to *sign* the DL-26 Form without consulting an attorney. Licensee contends further that he refused to take the chemical test only *when* he executed the hospital authorization form. Licensee argues that Officer Shupenko, as an agent of the Commonwealth, told him that he *must* execute an exculpatory hospital form authorizing the chemical test and that prior to that direction, Licensee had merely refused to *execute* the DL-26 Form without consulting an attorney. This, Licensee argues, is an act that, under the case law, cannot be deemed to be tantamount to a refusal of the chemical test. Finally, Licensee argues that because he was unable to make an unqualified and unequivocal assent to the test due to the gratuitous and confusing information relayed to him by Officer Shupenko, his signature on the hospital authorization form does not constitute a refusal to chemical testing as would warrant a suspension.

[5] Licensee contends that the DL-26 Form and the hospital authorization form were presented to him for his consideration and execution contemporaneously and by Officer Shupenko, rather than by hospital personnel. This assertion is belied by Licensee's own testimony wherein he stated that "when we got to [the] hospital he took me in and there was a nurse present, and she presented a form to me to take blood . . . ." Hr'g Tr. at 44, R.R. 57a. Licensee testified further that the hospital form was given to him first. Id.

The issue of whether a licensee's conduct constitutes a refusal to submit to chemical testing is a question of law to be determined based on the facts found by the trial court. Broadbelt v. Department of Transportation, Bureau of Driver Licensing, 903 A.2d 636 (Pa. Cmwlth. 2006). It is clear that anything less than an unqualified, unequivocal assent constitutes a refusal. Id. Further, a licensee's refusal to submit need not be expressed in words; rather, a licensee's conduct may demonstrate a refusal to submit to chemical testing. Id. In Burke v. Department of Transportation, Bureau of Driver Licensing, 733 A.2d 13, 16-17 (Pa. Cmwlth. 1999), we recognized that:

> "Requiring a licensee to sign a form, of whatever nature, in order to consent to chemical testing, is beyond the parameters of [Section] 1547 [of the Vehicle Code] which does not require a licensee to complete any pre-test procedure." *Department of Transportation, Bureau of Driver Licensing v. Renwick, 543 Pa. 122, 130-31, 669 A.2d 934, 939 (1996)).* Thus, a licensee's failure to sign a hospital form is not a per se refusal to chemical testing. *Id.* On the other hand, failure to sign a hospital form will constitute a refusal where the licensee has not given an unqualified, unequivocal assent to the test itself. *Id.*

Thus, while it is true that a licensee's failure to sign a hospital form is not a *per se* refusal to submit to chemical testing, there is no dispute in this matter that Licensee did sign the hospital authorization form wherein he refused to submit to a blood alcohol test. Notwithstanding this fact, as per our discussion of the previous issue herein, we reject Licensee's contention that he was unable to make an unqualified and unequivocal assent to chemical testing due to any conduct or remarks

made by Officer Shupenko. The trial court specifically found that "neither [Licensee's] words nor his actions, in any way, expressed an unequivocal, unqualified assent to chemical testing. Therefore, [Licensee's] conduct demonstrated a refusal to submit to chemical testing." Trial Court Op. at 3. Licensee's own testimony supports these findings.

Licensee testified that he refused to sign the DL-26 Form because he was not comfortable with being asked to give blood after having given a preliminary breath test. Hr'g Tr. at 46, R.R. at 59a. More importantly, while Licensee contends that he did not verbally refuse to submit to chemical testing, he admits that he refused to execute the DL-26 Form without consulting an attorney. This admission and Licensee's testimony, that "I balked . . . if this is going to proceed I need to talk to an attorney," is sufficient to uphold the trial court's finding that Licensee did not make an unequivocal and unqualified assent to the chemical testing. See Copeland v. Department of Transportation, Bureau of Driver Licensing, 678 A.2d 865, 866 (Pa. Cmwlth. 1996) ("The officer testified that he read [l]icensee implied consent warnings and asked him to submit to a chemical test; [l]icensee at no time agreed to take a test without signing forms, he verbally refused to sign any forms or take any tests unless his lawyer was present. The trial court correctly concluded that such testimony sufficed to dismiss the appeal." (citations omitted)). As such, it matters not that Licensee did not verbally refuse to submit to a blood alcohol test but only refused to execute the DL-26 Form. His actions clearly spoke for him.

The trial court's order is affirmed.[6]

JAMES R. KELLEY, Senior Judge

[6] We deny DOT's informal request in its brief that this matter be remanded for a determination of counsel fees and costs pursuant to Pa.R.A.P. 2744.

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Department of Transportation,	:	
Bureau of Driver Licensing	:	

O R D E R

AND NOW, this 14th day of November, 2011, the order of the Court of Common Pleas of Centre County entered in the above-captioned matter is affirmed.

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JAMES R. KELLEY, Senior Judge