

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Gregory Smith,	:
	:
Appellant	:
	:
v.	: No. 634 C.D. 2011
	:
Commonwealth of Pennsylvania,	: Submitted: September 16, 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<sup>1</sup>**

**FILED: December 19, 2011**

In this appeal, Gregory Smith (Licensee) seeks review of an order of the Court of Common Pleas of Dauphin County (trial court) that dismissed his appeal of a license suspension imposed by the Department of Transportation, Bureau of Driver Licensing (DOT), under Section 1547(b) of the Vehicle Code, 75 Pa. C.S. §1547(b) (chemical testing refusal). Specifically, Licensee contends the trial court erred in determining Pennsylvania State Trooper Baluh, who requested Licensee submit to blood alcohol testing, had reasonable grounds to believe Licensee was driving his vehicle at the time of the accident, or was intoxicated in violation of Section 3802 of the Vehicle Code, 75 Pa. C.S. §3802 (driving under the influence). Upon review, we affirm.

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<sup>1</sup> This case was reassigned to the author on November 1, 2011.

In September 2009, Licensee was a passenger in his own vehicle when it collided with a vehicle traveling the wrong way on a highway. Trooper Baluh arrived shortly after the accident. Upon arrival, Trooper Baluh discovered medical personnel were treating Licensee in the back of an ambulance. At that time, Trooper Baluh encountered Licensee and discerned a strong smell of alcoholic drinks on his breath. At the accident scene, Licensee was uncooperative and reluctant to answer Trooper Baluh's questions.

However, Trooper Baluh did learn Licensee owned one of the vehicles involved in the accident. Additionally, Trooper Baluh observed Licensee bleeding from the area around his mouth, and found what appeared to be corresponding blood on the driver's side airbag of Licensee's vehicle. Therefore, based on these circumstances, Trooper Baluh believed Licensee was driving his own vehicle under the influence at the time of the accident. The ambulance then transported Licensee to the hospital for further treatment. At the hospital, Trooper Baluh requested Licensee submit to a blood alcohol test. For reasons that are unclear, Licensee refused.

Two months later, DOT mailed a driving privileges suspension notice to Licensee citing his chemical testing refusal as the reason for his suspension.<sup>2</sup> Licensee filed an appeal to the trial court, which was dismissed. Specifically, the

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<sup>2</sup> DOT also issued Licensee a notice of disqualification of commercial driving privileges pursuant to Section 1613 of the Vehicle Code (CDL Disqualification). However, Licensee did not timely appeal the CDL disqualification, and the trial court dismissed his nunc pro tunc appeal. On appeal to this Court, we affirmed at Smith v. Department of Transportation, (Pa. Cmwlth., No. 2544 C.D. 2010, filed August 24, 2011).

trial court determined based on Trooper Baluh's observations and experience, he had reasonable grounds to believe Licensee was driving his car under the influence at the time of the accident. Licensee now appeals to this Court.<sup>3</sup>

On appeal, Licensee contends the trial court erred in determining Trooper Baluh had reasonable grounds to conclude he was driving, or was under the influence of alcohol in violation of Section 3802 of the Vehicle Code at the time of the accident. Specifically, Licensee claims Trooper Baluh's grounds were not reasonable in light of the exculpatory evidence discoverable at the accident scene.

After reviewing the record, the parties' briefs, and the law in this area, we see no need to elaborate on the trial court's thorough and thoughtful opinion. The issues presented were ably resolved in the comprehensive opinion of the Honorable Lawrence F. Clark, Jr. Therefore, we affirm on the basis of the trial court's opinion in the matter of Gregory Smith v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing, (No. 2544-2010 Civil, filed March 11, 2011) (C.P. Dauphin).

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ROBERT SIMPSON, Judge

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<sup>3</sup> Our review is limited to determining whether the trial court's findings are supported by substantial evidence and whether it committed an error of law or abused its discretion. Dep't of Transp., Bureau of Driver Licensing v. Moss, 605 A.2d 1279 (Pa. Cmwlth. 1992).

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**ORDER**

**AND NOW**, this 19<sup>th</sup> day of December, 2011, the order of the Court of Common Pleas of Dauphin County is **AFFIRMED** upon the opinion of the Honorable Lawrence F. Clark, Jr. in Gregory Smith v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing, (No. 2544-2010 Civil , filed March 11, 2011) (C.P. Dauphin).

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ROBERT SIMPSON, Judge

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HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION  
BY SENIOR JUDGE KELLEY

FILED: December 19, 2011

I respectfully dissent.

In order to support a one-year suspension of operating privilege imposed in conformity with Section 1547(b) of the Vehicle Code, 75 Pa. C.S. §1547(b), as a consequence of a chemical test refusal related to an arrest for violating Section 3802 of the Vehicle Code, DOT must establish that (1) the licensee was arrested for violating Section 3802; (2) by a police officer who had *reasonable grounds to believe that the licensee was operating a vehicle* while in violation of Section 3802; (3) that the licensee was requested to submit to a chemical test; (4) that the licensee refused to do so; and (5) that the police officer warned the licensee his refusal would result in the suspension of his operating privilege. Banner v. Department of

Transportation, Bureau of Driver Licensing, 558 Pa. 439, 445, 737 A.2d 1203, 1206 (1999); Schindler v. Department of Transportation, Bureau of Driver Licensing, 976 A.2d 601, 604 (Pa. Cmwlth.), petition for allowance of appeal denied, 603 Pa. 706, 983 A.2d 1250 (2009); Solomon v. Department of Transportation, Bureau of Driver Licensing, 966 A.2d 640, 643 (Pa. Cmwlth.), petition for allowance of appeal denied, 603 Pa. 678, 982 A.2d 67 (2009); Quick v. Department of Transportation, Bureau of Driver Licensing, 915 A.2d 1268, 1271 (Pa. Cmwlth. 2007). In determining whether an officer had reasonable grounds to believe that the licensee was operating a vehicle while in violation of Section 3802 of the Vehicle Code, the court must consider the totality of the circumstances. Banner, 558 Pa. at 446–447, 737 A.2d at 1207 (1999); Solomon, 966 A.2d at 642.

“Reasonable grounds exist when a person in the position of the police officer, viewing the facts and circumstances as they appeared at the time, could have concluded that the motorist was operating the vehicle while under the influence of intoxicating liquor.” Banner, 558 A.2d at 446, 737 A.2d at 1207. While reasonable grounds does not require a police officer to actually witness the driver driving his car, it does require the officer's belief to be objective in light of the surrounding circumstances. McCallum v. Commonwealth, 592 A.2d 820, 822 (Pa. Cmwlth. 1991). All of the facts and circumstances, as they appeared at the time of the arrest, must be considered. Farnack v. Department of Transportation, Bureau of Driver Licensing, 29 A.3d 44, (Pa. Cmwlth., No. 1257 C.D. 2010, filed March 28, 2011). An officer must consider *all* of the evidence, not just the evidence that suggests driving under the influence (DUI), while disregarding exculpatory evidence. Schindler, 976 A.2d at 606. “Stated otherwise, an officer is not free to pick and choose among the facts and rely exclusively on those that suggest DUI.” Id. at 605.

Whether reasonable grounds exist is a question of law reviewable by this Court on a case by case basis. Banner, 558 Pa. at 446, 737 A.2d at 1207.

In Department of Transportation, Bureau of Driver Licensing v. Park, 598 A.2d 578 (Pa. Cmwlth. 1991), an officer arrived at the scene of an accident and determined that a car had crossed the highway and struck a parked van. Two women were standing outside of the car, one of whom was the licensee. Park, 598 A.2d at 579. Each of the women denied driving the car and accused the other of driving; both had a strong odor of alcohol on their breath. Id. During his investigation of the accident, the officer noticed that the windshield on the passenger side of the car was cracked. Id. The officer observed that only one of the women had blood coming from her head; the officer did not observe any injuries on the licensee. Id. The officer then determined that the injured woman was the passenger and the licensee was the driver. Id. at 580. The officer requested the licensee to submit chemical blood testing, which she refused. Id. DOT suspended the licensee's operating privilege. Id. The trial court sustained the licensee's appeal. Id. This Court reversed, opining that the officer, viewing all of the facts and circumstances as they appeared to him, had reasonable grounds to believe that the licensee operated the vehicle under the influence of alcohol so as to support suspension of her operating privilege. Id.

Unlike the situation in Park, Trooper Baluh did not consider all the facts and circumstances, particularly strong exculpatory evidence available at the accident scene. The accident was not caused by Smith's vehicle, but by another vehicle that crossed lanes into oncoming traffic. When Trooper Baluh arrived at the scene, no one was in the vehicle. Reproduced Record (R.R.) at 16a. Trooper Baluh testified that he talked to Smith at the accident scene. R.R. at 16a. Smith told Trooper Baluh that he was not the driver of the vehicle. R.R. at 11a, 14a, 16a-17a. However,

Trooper Baluh believed Smith to be the driver because he owned the vehicle, his mouth was bleeding, and blood was found on the driver's side air bag. R.R. at 11a.

By itself, proof that a licensee is the owner of the vehicle does not establish a reasonable belief he was the driver. Kanousky v. Department of Transportation, Bureau of Driver Licensing, 655 A.2d 1061 (Pa. Cmwlth.), petition for allowance of appeal denied, 542 Pa. 650, 666 A.2d 1059 (1995). With regard to existence of blood on Smith and the driver's side airbag, had Smith been the only person in the vehicle or the only person bleeding as a result of the accident, certainly reasonable grounds would exist to believe Smith was the driver. However, Smith was not the only person in the car and, unlike the situation in Park, he was not the only person bleeding as a result of the accident. Corrine Bracey had been in the vehicle and was severely injured and bleeding. While Trooper Baluh was aware that Bracey had been in the vehicle and understood from the EMS crew that she was "the most severely injured," Trooper Baluh did not see Bracey and was unaware that she was bleeding from the accident. R.R. at 16a-18a.

Trooper Baluh did not speak to Bracey at the accident scene, nor did he speak with any other witnesses at the scene. R.R. at 16a. Had he interviewed Ralph Benson, who witnessed the accident and remained at the scene, Benson would have confirmed that Bracey was the driver, not Smith. R.R. at 31a-33a. Benson testified that he and his friend pulled Bracey from the driver's side of the vehicle. R.R. at 32a. Benson testified that the troopers did not ask him or any of the other people at the accident scene for information as far as who was driving or what had happened. R.R. at 33a. Trooper Baluh only testified that he spoke to Smith in the ambulance and again at the hospital.

The inadequacy of the investigation is underscored by Trooper Baluh's own testimony. When asked if he performed any investigation to determine who was



the driver, Trooper Baluh responded, that “Trooper Rudella, R-u-d-e-l-l-a,<sup>[1]</sup> was the lead investigator. As you can imagine, the scene was a little chaotic. So I let Mr. Smith go with the EMS crew. He was injured, let him get to the hospital as quick as possible.” R.R. at 11a. Trooper Baluh testified that after determining that Smith owned the vehicle, no further discussions were held at the scene and that he did not recall anything else at the scene. R.R. at 12a. Trooper Baluh testified “[w]e cleared everything up there and went to Hershey Medical Center.” Id. Once Trooper Baluh determined that Smith was the owner of the vehicle, he made up his mind that Smith was the driver of the vehicle.

By failing to conduct a proper investigation at an accident scene and ignoring relevant exculpatory evidence, Trooper Baluh’s belief cannot constitute reasonable grounds. Information was readily available at the scene of the accident regarding who operated the vehicle, but was completely ignored. By only considering the scant information suggesting that Smith had operated the vehicle under the influence of alcohol and completely ignoring evidence to the contrary, the trooper’s belief that Smith was driving the vehicle is not objective and cannot as a matter of law constitute reasonable grounds.<sup>2</sup>

Moreover, had Smith underwent chemical testing and actually tested for a blood alcohol content above the legal limit, Smith would have succeeded on his license suspension appeal because the trial court specifically found that Smith was not the driver. Trial Court Op., March 11, 2011, at 13. The defense of not driving should likewise vitiate a suspension pursuant to Section 1547(b) of the Vehicle Code

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<sup>1</sup> Trooper Rudella did not testify.

<sup>2</sup> While the test for determining if reasonable grounds exist is not very demanding, as applied by the majority, it is foreseeable that an officer could request every person in a motor vehicle to undergo chemical testing.

for refusing to undergo testing. The purpose of the DUI laws is to prevent persons from operating motor vehicles under the influence of alcohol, not to punish passengers who refuse chemical testing. As the trial court observed, Smith “who was not the operator of a motor vehicle, was asked to undergo an invasive procedure to obtain a direct blood alcohol content (BAC) reading, it is not unforeseeable that a citizen so situated might not have acquiesced to such a demand for a blood sample, knowing he was not the driver of any motor vehicle involved in the incident.” Trial Court Op., March 11, 2011, at 13.

On the facts presented, I do not believe that Trooper Baluh had “reasonable grounds” to believe that Smith had operated his motor vehicle. For these reasons, I would reverse.

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JAMES R. KELLEY, Senior Judge