

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas McGinley,	:	
Appellant	:	
	:	
v.	:	No. 836 C.D. 2011
	:	Submitted: October 7, 2011
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: November 2, 2011

Thomas McGinley (Licensee) appeals from the April 7, 2011, order of the Court of Common Pleas of Allegheny County (trial court), which dismissed his appeal challenging the suspension of his driver's license by the Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (DOT) for refusing to submit to chemical testing, a violation of section 1547(b) of the Vehicle Code.<sup>1</sup> We affirm.

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<sup>1</sup> 75 Pa. C.S. §1547(b). Section 1547(b)(1) of the Vehicle Code authorizes DOT to suspend the driver's license of any person placed under arrest for driving under the influence of alcohol who is requested to submit to chemical testing and refuses to do so. 75 Pa. C.S. §1547(b)(1).

On December 26, 2010, Officer Edward Lenz, an Ohio Township police officer, was dispatched to a Get Go gas station on Ben Avon Heights Road. The officer observed Licensee pumping gas while drinking a beer. When Licensee saw the officer approaching, Licensee put the open can of beer on top of the gas pump.

When Officer Lenz asked Licensee for identification, the officer noticed a strong odor of alcohol and slurred speech. The officer asked Licensee to submit to field sobriety tests. Officer Lenz attempted to conduct the horizontal gaze nystagmus test, but Licensee refused to follow the officer's stimulus with his eyes. The officer then attempted to administer the walk and turn test, but Licensee refused to do the test. Officer Lenz then asked Licensee to submit to a blood test, but Licensee again refused. The officer read the pertinent sections of the DL-26 form to Licensee, deemed Licensee's conduct a refusal to submit to chemical testing and placed him under arrest for driving under the influence of alcohol.

As a result of the refusal, DOT suspended Licensee's driver's license. Licensee subsequently appealed to the trial court. At a *de novo* hearing, Officer Lenz testified as follows:

Q Did you ask [Licensee] how he had gotten to this gas station?

A I did. And he did say he was driving.

Q He admitted to driving to the gas station?

A Yes. . . . And I could see there was no one else in the vehicle. He was the only occupant.

Q Does the Get Go sell beer?

A No.

Q Any place in close proximity that sells beer?

A Not to my knowledge.

Q Did [Licensee] tell you where he got the beer you observed him drinking?

A He did not.

Q Did he ever claim to have bought the beer at the Get Go?

A He did not.

Q Did he ever claim to have bought the beer after he arrived at the Get Go gas station?

A He did not.

(N.T., 8/19/10, at 10-11, R.R. at 20a-21a.) After considering the evidence, the trial court found that Officer Lenz had reasonable grounds to request that Licensee submit to chemical testing. Thus, the trial court dismissed Licensee's appeal. Licensee now appeals to this court.<sup>2</sup>

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<sup>2</sup> Our scope of review is limited to determining whether the trial court's findings of fact are supported by competent evidence and whether the trial court committed an error of law or an abuse of discretion. *Solomon v. Department of Transportation, Bureau of Driver Licensing*, 966 A.2d 640, 642 n.3 (Pa. Cmwlth.), *appeal denied*, 603 Pa. 678, 982 A.2d 67 (2009).

Licensee argues that the trial court erred in concluding that the officer had reasonable grounds to believe that Licensee was in actual physical control of the movement of a vehicle while under the influence of alcohol.<sup>3</sup> We disagree.

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 alcohol. *Banner v. Department of Transportation, Bureau of Driver Licensing*, 558 Pa. 439, 446, 737 A.2d 1203, 1207 (1999).

In determining whether an officer had reasonable grounds to believe that a motorist was in “actual physical control” of a vehicle, the court must consider the totality of the circumstances, including the location of the vehicle, whether the engine was running and whether there was other evidence indicating that the motorist had driven the vehicle at some point prior to the arrival of the police. Whether reasonable grounds exist is a question of law reviewable by the court on a case by case basis.

*Id.* at 446-47, 737 A.2d at 1207 (citation omitted) (footnote omitted). “[A]t the very least, there must be some objective evidence that the motorist exercised control over the movement of the vehicle at the time he was intoxicated.” *Id.* at 448, 737 A.2d at 1207. “[T]here is no requirement that a police officer must actually observe the driver operating the motor vehicle.” *Polinsky v. Department of Transportation*, 569 A.2d 425, 427 (Pa. Cmwlth. 1990).

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<sup>3</sup> Under section 1547(a) of the Vehicle Code, any person who drives, operates or is in actual physical control of the movement of a motor vehicle shall be deemed to have given consent to chemical testing if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a motor vehicle while under the influence of alcohol. 75 Pa. C.S. §1547(a).

Here, the officer observed Licensee drinking a beer while pumping gas into a motor vehicle. Licensee emitted a strong odor of alcohol, had slurred speech and admitted that he had driven the vehicle to the gas station. Licensee could not have purchased the beer at or near the gas station. Thus, it was reasonable for the officer to conclude that Licensee had been drinking for a while, long enough to have slurred speech, and, thus, was under the influence of alcohol when he drove the vehicle to the gas station.

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

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ORDER

AND NOW, this 2<sup>nd</sup> day of November, 2011, the order of the Court of Common Pleas of Allegheny County, dated April 7, 2011, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Senior Judge