IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Teresa A. Palm, Appellant	:	
v.	:	No. 902 C.D. 2010
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing	:	Submitted: August 27, 2010

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: September 30, 2010

Teresa A. Palm appeals from an order of the Court of Common Pleas of Mifflin County (trial court) dismissing her appeal from a one year suspension of her operating privilege pursuant to Section 1547(b)(1)(i) of the Vehicle Code[1] and

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

> (b) Suspension for refusal.—
>
> (1) If any person placed under arrest for a violation of section 3802 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) Except as set forth in subparagraph (ii), for a period of 12 months.

from the disqualification of her commercial operating privilege pursuant to Section 1613 of the Vehicle Code.[2] We affirm.

By separate notices mailed December 17, 2009, Palm was notified by the Pennsylvania Department of Transportation, Bureau of Driver Licensing (DOT), that: (1) her operating privilege was suspended for one year effective January 21, 2010, as a result of her violation of Section 1547 of the Vehicle Code, 75 Pa.C.S. §1547,[3] chemical test refusal; and (2) her commercial operating privilege was disqualified for one year effective January 21, 2010, also as a result of her violation of Section 1547 of the Vehicle Code. Palm appealed both notices to the trial court and a hearing *de novo* ensued.

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[2] 75 Pa.C.S. §1613. Section 1613 provides, in relevant part, as follows:

> (D.1) DISQUALIFICATION FOR REFUSAL.-- Upon receipt of a report of test refusal, the department shall disqualify the person who is the subject of the report for the same period as if the department had received a report of the person's conviction for violating one of the offenses listed in section 1611(a)(relating to disqualification). A person who is disqualified as a result of a report of test refusal that originated in this Commonwealth shall have the same right of appeal as provided for in cases of suspension. . . .

Section 1611(a) of the Vehicle Code, 75 Pa.C.S. §1611(a), provides, in relevant part, as follows:

> (a) FIRST VIOLATION OF CERTAIN OFFENSES.-- Upon receipt of a report of conviction, the department shall, in addition to any other penalties imposed under this title, disqualify any person from driving a commercial motor vehicle or school vehicle for a period of one year for the first violation of:
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> (1) section 3802 (relating to driving under influence of alcohol or controlled substance) or former section 3731, where the person was a commercial driver at the time the violation occurred;

[3] Section 1547 of the Vehicle Code is also known as the Implied Consent Law.

Based on the testimony of Officer Chad Ehresman of the Mifflin County Regional Police Department, the trial court made the following findings of fact. On November 22, 2009, Officer Ehresman was dispatched to pursue a red Dodge Dakota that had been observed hitting the curb of a street. Upon arriving to the same area as the vehicle, Officer Ehresman observed the vehicle crossing over the yellow center line of the street and then swerving back over to the white outer line. The vehicle pulled into a local convenience store parking lot and Officer Ehresman followed, intending to investigate the driver. According to Officer Ehresman, the odor of alcohol was detected on Palm's person, her eyes appeared blood shot and glassy, and her motor skills appeared slow. In Officer Ehresman's opinion, Palm was unable to perform field sobriety tests. After Palm was placed under arrest for driving under the influence, she was transported by Officer Ehresman to Lewistown Hospital for chemical testing. Palm was not administered Miranda[4] warnings.

Upon arriving at the hospital, Officer Ehresman read Palm the warnings set forth in the most current version of the DL-26 Form.[5] After hearing

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[4] Miranda v. Arizona, 384 U.S. 436 (1966).

[5] Form DL-26 is officially entitled "Chemical Testing Warnings and Report of Refusal [to] Submit Chemical Testing as Authorized by Section 1547 of the Vehicle Code in Violation of Section 3802 (relating to driving under the Influence of Alcohol or Controlled Substance)." The warnings contained on the DL-26 Form in this case are as follows:

> It is my duty as a police officer to inform you of the following:
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> 1. You are under arrest for driving under the influence of alcohol or a controlled substance in violation of Section 3802 of the Vehicle Code.
>
> 2. I am requesting that you submit to a chemical test of BLOOD [handwritten] (blood, breath or urine. Officer chooses the chemical test).

(Continued....)

these warnings, Palm repeatedly requested to speak to her boyfriend before taking the test. Officer Ehresman repeatedly explained that she would not be permitted to speak with anyone until after she took the chemical test. Palm continued to request to speak with her boyfriend, and asserted the Fifth Amendment to the United States Constitution. Officer Ehresman recorded a refusal to submit to chemical testing on the DL-26 Form.

Based on our Supreme Court's decision in Department of Transportation, Bureau of Driver Licensing v. Scott, 546 Pa. 241, 684 A.2d 539 (1996), the trial court rejected Palm's argument that she did not give a knowing and conscious refusal because she was confused as to the application of her

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> 3. If you refuse to submit to the chemical test, your operating privilege will be suspended for at least 12 months. If you previously refused a chemical test or were previously convicted of driving under the influence, you will be suspended for up to 18 months. In addition, if you refuse to submit to the chemical test, and you are convicted of violating Section 3802(a)(1) (relating to impaired driving) of the Vehicle Code, then, because of your refusal, you will be subject to more severe penalties set forth in Section 3804(c) (relating to penalties) of the Vehicle Code. **These are the same penalties that would be imposed if you were convicted of driving with the highest rate of alcohol, which include a minimum of 72 consecutive hours in jail** and a minimum fine of $1,000.00 up to a maximum of five years in jail and a maximum fine of $10,000.
>
> 4. 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 test, resulting in the suspension of your operating privilege and other enhanced criminal sanctions if you are convicted of violating Section 3802(a) of the Vehicle Code.

See Original Record, Commonwealth's Exhibit #1 (emphasis in original).

Miranda rights and that once she asserted the Fifth Amendment, she was entitled to a full explanation that her Miranda rights were not applicable under the Implied Consent Law. The trial court determined that the warnings given to Palm, as read verbatim from the DL-26 Form by Officer Ehresman, were adequate. As such, the trial court concluded that Officer Ehresman did all that was legally required to ensure that Palm had been advised of the consequences of refusing to submit to chemical testing. The trial court concluded further that Palm's subjective belief that her Miranda criminal rights applied to the civil proceeding in which the chemical test of her blood-alcohol content is the issue did not excuse her refusal. Accordingly, the trial court held that Palm's failure to submit to chemical testing constituted a refusal and dismissed her appeals. This appeal followed.[6]

Herein, Palm argues that the trial court erred in denying her appeals because DOT failed to prove that her refusal to submit to chemical testing was knowing and voluntary.[7] Palm contends that, because Officer Ehresman failed to

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[6] Our scope of review is limited 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 an abuse of discretion. Orndoff v. Department of Transportation, Bureau of Driver Licensing, 654 A.2d 1 (Pa. Cmwlth. 1994).

[7] In order to support a one-year suspension of operating privileges imposed in conformity with Section 1547(b) as a consequence of a chemical test refusal related to an arrest for violating Section 3802 of the Vehicle Code, 75 Pa. C.S. §3802, 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 fulfilled the duty imposed by Section 1547(b)(2) by advising the licensee that her operating privileges would be suspended if she refused to submit to chemical testing and that, in the event the licensee was convicted of violating Section 3802(a)(1) after refusing testing, the licensee would be subject to the penalties set forth in Section 3804(c). 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 responsibility to prove that she was not capable of making a knowing and conscious refusal to take the chemical test. Id.

notify her that her constitutional rights are applicable only to the criminal charges but not the Implied Consent Law, her refusal was not knowing and voluntary. Palm contends further that our Supreme Court's decision in Scott does not apply to this case. Palm states that in Scott, the officer stated to the licensee that his Miranda rights did not apply to chemical testing under the Implied Consent Law. Palm contends that in Scott, therefore, the licensee received the appropriate warnings. In her case, however, Palm points out that Miranda warnings were never given to her by Officer Ehresman and she had to assert them on her own after asking to speak to her boyfriend several times. This, Palm argues, does not satisfy the warnings required by the Implied Consent Law because Officer Ehresman never specifically told her that her constitutional rights did not apply under the Implied Consent Law.

In other words, Palm is contending that she was entitled to a full explanation that her Miranda rights were not applicable under the Implied Consent Law before she could make a knowing and conscious refusal to submit to chemical testing. However, this argument has been fully addressed and rejected by our Supreme Court in Scott and more recently by this Court in Witmer v. Department of Transportation, Bureau of Driver Licensing, 880 A.2d 716 (Pa. Cmwlth. 2005), petition for allowance of appeal denied, 591 Pa. 730, 920 A.2d 835 (2007).

In Department of Transportation v. O'Connell, 521 Pa. 242, 252, 555 A.2d 873, 878 (1989), our Supreme Court held that when a licensee is asked to submit to chemical testing under the Implied Consent Law, the officer making the request has a duty to explain to the licensee that her Miranda rights are inapplicable to such a request. This admonition is commonly referred to as an O'Connell warning.

In Scott, 546 Pa. at 253, 684 A.2d at 545, our Supreme Court further explained the duty of arresting officers to ensure that a licensee makes a knowing and conscious decision on whether to submit to chemical testing:

> In order to guarantee that a [licensee] makes a knowing and conscious decision on whether to submit to testing or refuse and accept the consequence of losing [her] driving privileges, the police must advise the [licensee] that in making this decision, [she] does not have the right to speak with counsel, or anyone else, before submitting to chemical testing, and further, if the [licensee] exercises [her] right to remain silent as a basis for refusing to submit to testing, it will be considered a refusal and [she] will suffer the loss of [her] driving privileges; ... the duty of the officer to provide the *O'Connell* warnings as described herein is triggered by the officer's request that the [licensee] submit to chemical sobriety testing, whether or not the [licensee] has first been advised of [her] *Miranda* rights.

"Accordingly, 'once an officer provides *O'Connell* warnings to a [licensee], the officer has done all that is legally required to ensure that the [licensee] has been fully advised of the consequences of refusing to submit to chemical testing,' and a refusal to submit to chemical testing will not be excused as unknowing because the [licensee's] subjective understanding of [her] *Miranda* rights may have misled the [licensee] into refusing the test." Witmer, 880 A.2d at 720 (quoting Scott, 546 Pa. at 254-255, 684 A.2d at 546).

Herein, the trial court found that Officer Ehresman read the O'Connell warnings as contained on the DL-26 Form verbatim to Palm several times and that the warnings were adequate to satisfy the requirements of the Implied Consent Law. As such, Officer Ehresman did specifically advise Palm that she did not have the right to consult with an attorney or anyone else, including her boyfriend, before deciding whether to submit to chemical testing and of the consequences of her

refusal to submit. Officer Ehresman was required to do no more and no less regardless of whether he had first advised Palm of her Miranda rights. Id. As we pointed out in Witmer, Officer Ehresman "was not required to explain the difference between Miranda rights and the Implied Consent Law." Id. As such, Officer Ehresman was not required to specifically inform Palm that her Miranda or constitutional rights did not apply under the Implied Consent Law.

Accordingly, Palm's arguments to the contrary are clearly without merit. Thus, regardless of Palm's subjective belief to the contrary, the trial court properly determined that Palm was provided with the necessary warnings and that her failure to submit to chemical testing constituted a refusal.

The trial court's order is affirmed.

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JAMES R. KELLEY, Senior Judge

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

ORDER

AND NOW, this 30th day of September, 2010, the April 26, 2010, order of the Court of Common Pleas of Mifflin County, entered at CP-44-CV-2001-2009, is affirmed.

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JAMES R. KELLEY, Senior Judge