[J-52-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, BUREAU OF DRIVER LICENSING,	:	No. 145 MAP 2005
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	:	Appeal from the Order of the Commonwealth Court entered on March 11, 2005, at No. 2170 CD 2004, affirming the Order of the Court of Common Pleas of Chester County, Civil Division, entered on September 4, 2004, at No. 04-05376.
Appellee	:	
v.	:	
MICHAEL J. WEAVER,	:	
	:	873 A.2d 1 (Pa. Cmwlth. 2005)
Appellant	:	
	:	ARGUED: April 6, 2006

DISSENTING OPINION

MR. JUSTICE BAER **DECIDED: December 28, 2006**

Today, the Majority holds that the legislature's directive requiring a police officer to inform one under arrest for driving under the influence of the consequences of failure to consent to chemical testing is met through the following text:

> It is my duty as a police officer to inform you that if you refuse to submit to the chemical test, your operating privilege will be suspended for at least one year. In addition, if you refuse to submit to the chemical test, and you are convicted of, plead to, or adjudicated delinquent with respect to violating Section 3802(a) of the Vehicle Code, because of your refusal, you will be subject to the more severe penalties set forth in Section 3804(c) of the Vehicle Code, which include a minimum of 72 hours in jail and a minimum fine of $1000.00.

Form DL-26 (December 2003).

Respectfully, this is meaningless to all except those most involved in the intricacies of the law surrounding driving under the influence. Does anyone really question what the reaction of the United States Supreme Court would have been if in the aftermath of its decision in Miranda v. Arizona, 384 U.S. 436, 444 (1966), police would have been so presumptuous as to deliver Miranda warnings[1] by informing arrestees: "You have rights as provided at 384 U.S. 436, 444"? Indeed, while many arrestees might well be able to recite the procedural safeguards of constitutional rights required by Miranda from the countless times those warnings have been stated in movies and television depictions, few judges or lawyers and virtually no laypeople could discern the penalties provided merely by reference to "Section 3804(c)."

Accordingly, I cannot join my colleagues in holding that the warnings provided by Form DL-26 satisfy the Legislature's directive pursuant to 75 Pa.C.S. § 1547(b)(2) and our requirement in Commonwealth v. O'Connell, 555 A.2d 873 (Pa. 1989), that police officers provide an arrestee with information regarding the consequences of refusing chemical testing sufficient to enable that arrestee to make an informed decision of whether to consent to the test.

In O'Connell, we insisted that the arrestee be told not only of the civil consequences of refusing testing but also that the constitutional right to an attorney did not apply to the decision to refuse the chemical test.[2] "An arrestee is entitled to this

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[1] Miranda requires the police to inform an arrestee that: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda, 384 U.S. at 444.

[2] I note that our decision in O'Connell predated the provision imposing incarceration for refusal of testing and subsequent conviction of the underlying crime, and thus only contemplated the sufficiency of warnings for purposes of the civil collateral consequence of license suspension. I do not speak to whether the same (continued…)

information so that his choice to take a [chemical] test can be knowing and conscious and we believe that requiring the police to qualify the extent of the right to counsel is neither onerous nor will it unnecessarily delay the taking of the test." 555 A.2d 878.

Through Section 1547(b)(2)(ii), the legislature imposed on police officers a duty to inform the arrestee that "[t]he person's operating privileges will be suspended upon refusal to submit to chemical testing" and that "[u]pon conviction, plea or adjudication of delinquency for violating section 3802(a) [DUI], the person will be subject to the penalties provided in section 3804(c) (relating to penalties)." 75 Pa.C.S. § 1547(b)(ii). These penalties range from "imprisonment of not less than 72 consecutive hours" and "a fine of not less than $1,000 nor more than $5,000" for first-time offenders to "imprisonment of not less than one year" and "a fine of not less than $2,500" for a third or subsequent offense. 75 Pa.C.S. § 3804(c). Clearly, the purpose of Section 1547(b)(ii) is to entitle arrestees to the information necessary to assess the dire consequences they face if they fail to consent to chemical testing, to ensure their choice in that regard is knowing and conscious, as we described in O'Connell.

My colleagues hold that "[t]he plain language [of Section 1547(b)(2)] requires only that the officer inform the arrestee that if he is convicted of DUI, refusal will result in additional penalties . . . ." Maj. Slip Op. at 8. The Majority even suggests that PennDOT's provision of information regarding the minimum penalties of Section 3804(c) is, in fact, not required to fulfill an officer's informational duty pursuant to Section 1547(b)(2). Maj. Slip Op. at 9 ("This inclusion of accurate information concerning the minimum penalties, beyond what the legislature required, does not affect the validity of

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(…continued)
analysis would apply following the addition of penalties involving imprisonment as that issue has not been fully briefed or argued before this Court.

form DL-26 warnings." (emphasis added)). I cannot conclude that the Legislature intended that the mere citation to a section number, as the Commonwealth suggests, or reference to "additional penalties," as the Majority opines, would provide the information necessary to allow arrestees to make a knowing choice. The section number is meaningless to most arrestees and the inclusion of merely the minimum sentence as provided in Form DL-26 does not provide information necessary for a knowing decision, and, given the severe consequences for repeat offenders, may well be misleading. See O'Connell, 555 A.2d at 877 ("The law has always required that the police must tell the arrestee of the consequences of a refusal to take the test so that he can make a knowing and conscious choice.").

I do not contend that an officer has a duty to recite every penalty provided in Section 3804(c). Instead, I believe the import of the penalties could be conveyed sufficiently by the addition of information regarding the maximum penalty.[3] The additional information will not only provide the arrestee with the ability to make a knowing choice, but also will forward the purpose of the implied consent rule. The greater warning will likely entice more arrestees to submit to the test to avoid the greater penalty for refusing. More arrestees submitting to the test will garner better evidence for the Commonwealth and the courts in determining the proper punishment for those found in violation of Pennsylvania's laws.

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[3] For example, rather than informing the arrestee that if he refuses and is convicted, he "will be subject to the more severe penalties set forth in Section 3804(c) of the Vehicle Code, which include a minimum of 72 hours in jail and a minimum fine of $1,000," the officer could provide a fuller warning by adding "and, if you have been convicted of DUI in the past, you may be subject to imprisonment of not less than one year and a fine of not less than $2,500."

Accordingly, I would reverse the decision of the Commonwealth Court and hold that the warnings provided by Form DL-26 do not meet the requirements of 75 Pa.C.S. § 1547(b)(2).

Madame Justice Baldwin joins this opinion.