

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

STEPHEN D. FIGULY, )  
 )  
           Petitioner, )  
 )  
           v. )  
 )  
 MICHAEL SHAHAN, in his )  
 capacity as Director of the Division )  
 of Motor Vehicles, an Agency of the )  
 State of Delaware, )  
 )  
           Respondent. )

C.A. No. 05M-05-041-FSS

Submitted: August 31, 2005  
Decided: September 29, 2005

**MEMORANDUM OPINION AND ORDER**

**Upon Petition for Writ of Mandamus – *GRANTED***

A. Gary Wilson, Esquire, 5700 Kirkwood Highway, Suite 107, Wilmington, Delaware, 19808. Attorney for Petitioner.

Frederick H. Schranck, Esquire, Department of Transportation, P.O. Box 778, Route 113, Dover, Delaware, 19903. Deputy Attorney General for the Department of Transportation.

SILVERMAN, J.

Now, this 30<sup>th</sup> day of September 2005, after review of the foregoing Motion, it appears to the Court as follows:

When the police stopped Petitioner on suspicion of driving under the influence, he refused to permit chemical testing. Not only was Petitioner cited for a moving violation, the police invoked the license revocation provision under the implied consent rule. While the revocation proceeding was pending, Petitioner pleaded guilty to driving under the influence. The plea agreement stipulated that Petitioner's blood alcohol concentration was less than .08. Petitioner made a first-offense election pursuant to 21 *Del. C.* §4177C.

Based on his stipulated alcohol concentration, less than .08, and his election, Petitioner applied for the conditional driver's license contemplated by §4177C(b). Relying on Petitioner's refusal to submit to chemical testing, however, Respondent went forward with the revocation proceeding as authorized by 21 *Del. C.* §2742. Now, Petitioner contends that the implied-consent law notwithstanding, he is entitled to a conditional driver's license under §4177C(b). As discussed below, due to the plea agreement, Petitioner is entitled to a conditional license, and a Writ of Mandamus.

## I.

The facts are straightforward and mostly undisputed. On November 21, 2004, the Delaware State Police stopped Petitioner for suspicion of driving while

under the influence on the Kirkwood Highway. Petitioner refused to supply a breathalyzer sample.<sup>1</sup> Accordingly, Petitioner was charged with driving under the influence<sup>2</sup> and the police started an administrative proceeding based on Petitioner's implied consent violation.<sup>3</sup> As mentioned above, while the administrative matter was awaiting a hearing, Petitioner entered a conditional plea and election in the Court of Common Pleas.<sup>4</sup>

Consistent with the first-offenders law, the Court of Common Pleas issued an order without entering a judgment of guilt, deferred further proceedings and placed defendant on probation.<sup>5</sup> Consistent with the plea agreement between Petitioner and the State, which facilitated the plea and election, the order's caption was amended, by hand, to read: "DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS (FOE) less than .08."<sup>6</sup> It is not denied that when Petitioner entered his conditional plea and election, his blood alcohol was listed

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<sup>1</sup> *Petition for Writ of Mandamus* at 1.

<sup>2</sup> 21 *Del. C.* §2177.

<sup>3</sup> 21 *Del. C.* Chpt. 27.

<sup>4</sup> *Petition* at 1.

<sup>5</sup> *State of Delaware v. Stephen Figuly*, Del. CCP, Cr. A. No. 0411019204, at 1, James, J. (March 3, 2005).

<sup>6</sup> *Id.* at 1 (emphasis supplied).

“in order to satisfy requirements for issuance of a conditional license.”<sup>7</sup> In short, Petitioner, the State and the Court of Common Pleas all anticipated that Petitioner would apply for and receive a conditional license.

Once Petitioner entered his conditional plea and election, however, he waived his right to a revocation hearing under the implied consent law. The Division of Motor Vehicles properly aborted the hearing process because Petitioner was not entitled to reinstatement under §2742. Nevertheless, Petitioner immediately applied for a conditional license under 21 *Del. C.* §4177C(d). Ignoring the stipulation in the Court of Common Pleas as to Petitioner’s alcohol concentration and relying on his refusal to submit to chemical testing, Respondent refused to issue a conditional license. That decision precipitated this proceeding.

As a matter of fairness to Petitioner and courtesy to the court, Respondent issued a temporary license, allowing Petitioner time to file this proceeding. Thereafter, the court extended the temporary license allowing this litigation to move in an orderly manner. As to the temporary license, the court observes that this was a first-offense. Moreover, Petitioner completed the required substance abuse evaluation and any course of treatment instruction called for under the first-offender law.

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<sup>7</sup> *Petition* at 2.

## II.

Although the implied consent law -- which revokes licenses, and §4177C(d) -- which grants licenses, can conflict, they are not mutually exclusive. The two provisions can be harmonized. Under the implied consent law, Petitioner's refusal to submit to chemical testing cost him his license. Petitioner's conditional plea and election cost him his right to a hearing and reinstatement under the implied consent law. Section 4177C(d), however, provides:

Notwithstanding any other provision to the contrary, any person whose alcohol concentration is less than .08 (1) who is convicted of a first offense pursuant to §4177 of this title, (2) who makes a first offense election pursuant to §4177B of this title, or (3) whose license is revoked for a first offense pursuant to Chapter 27 of this title, where it is not established that the person was under the influence of any other intoxicating substance, shall be granted a conditional license immediately upon application . . . .<sup>8</sup>

Through its introductory phrase, “notwithstanding any other provision to the contrary,” §4177C(d) establishes that it is an alternative means by which a first-offender whose alcohol concentration was less than .08 may obtain a conditional license. In other words, if an applicant meets §4177C(d) terms, that law trumps Chapter 27 of Title 21.

The State argues:

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<sup>8</sup> 21 *Del. C.* §4177C(d).

By its express terms 21 *Del. C.* §4177C(d) requires an alcohol concentration test result of less than 0.08 in order for any person to take advantage of its conditional license provisions. In the absence of an actual BAC test, however, no stipulation to a particular BAC level should be permitted to give plaintiff the right to a conditional license under that law.<sup>9</sup>

The State further argues that the first phrase of §4177C(d) contemplates a chemical test. Actually, as provided above, §4177C(d) refers to “an alcohol concentration of less than .08,” without mentioning, expressly or otherwise, any “test.”<sup>10</sup> The statute is straightforward, if an applicant for a conditional license under §4177C(d) meets the statute’s other conditions and the person’s alcohol concentration is less than .08, the applicant is entitled to a conditional license immediately upon application. The statute is silent on how the applicant’s alcohol concentration can be proved. In this case, the State agreed that Petitioner’s alcohol concentration was below the limit.

In light of the Court of Common Pleas’ proceedings and its stipulated finding that the Petitioner’s alcohol concentration was less than .08, and no evidence to the contrary, the only conclusion Respondent and the court can draw from the record is that, despite his refusal to submit to chemical testing, Petitioner’s alcohol concentration was less than .08. Therefore, because he has met all the other statutory

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<sup>9</sup> *Response to Petition for Mandamus* at 2.

<sup>10</sup> 21 *Del. C.* §4177C(d).

conditions, Petitioner is entitled to a conditional license under §4177C(d). Respondent has no discretion under §4177C(d).<sup>11</sup> If the State wishes to avoid this result in future cases, it can refuse to stipulate or concede that the accused motorist's alcohol concentration was under the statutory limit.

### III.

Here, Petitioner has established, and the State does not deny, that when he was arrested for driving under the influence, his alcohol concentration was less than .08 and he has met all the other requirements under 21 *Del. C.* §4177C(d). Accordingly, he is entitled to a conditional license under that Section. Respondent must issue one. The petition for a Writ of Mandamus is **GRANTED**.

**IT IS SO ORDERED,**

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Judge

cc: Prothonotary (Civil Division)

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<sup>11</sup> *State ex rel. Daniel D. Rappa, Inc. v. Buck*, 275 A.2d 795, 796 (Del. Super. Ct. 1971) (“Although writs of mandamus will not be granted to control the discretionary action of a public officer or body, where the particular action is ministerial and where, under the circumstances there is a clear duty to take that action, such public officer or body may be mandated to do so”).