Matter of Gorecki v New York State Dept. of Motor Vehs.
2019 NY Slip Op 30382(U)
January 29, 2019
Supreme Court, Suffolk County
Docket Number: 005063/2018
Judge: John H. Rouse
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INDEX NO. 005063/2018

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 10/19/2018
ADJ. DATE: 12/19/2018
Mot. Seq. 001-MG
CASEDISP

In the Matter of the Application of CARRIE GORECKI,

Petitioner

DECISION & ORDER

For a Judgment Under Article 78 of the CPLR

-against-

NEW YORK STATE DEPARTENT OF MOTOR VEHICLES and THERESA L. EGAN, as New YOrk State Executive Deputy Commissioner of Motor Vehicles,

Respondent

TO:

REYNOLDS CARONIA GIANELLI LLP
200 MOTOR PARKWAY, STE C17
HAUPPAUGE, NY 11788
631-231-1199

NEW YORK STATE DEPT OF LAW
300 MOTOR PARKWAY, STE 230
HAUPPAUGE, NY 11788
631-231-2424

Upon the reading and filing of the following papers in this matter: (1) Order to Show Cause granted on September 21, 2018; Verified Petition filed on September 21, 2018 and Verified by Petitioner on September 20, 2018; Affirmation in Support by Michael E. Fehringer, Esq. affirmed on September 20, 2018 with Exhibits A-M attached; (2) Verified Answer by Respondent; (3) Administrative Return dated October 29, 2018 with Exhibits A and B; (4) Respondent's Memorandum of Law in Support of Their Verified Answer dated October 29, 2018 with Exhibit 1 attached thereto; and (5) Reply Affirmation of Michael E. Fehringer, Esq. affirmed on December 18, 2018; it is:

ORDERED that the (Seq. #001) petition to vacate the determination of the Respondent that there were no unusual, extenuating and compelling circumstances requiring the restoration of the petitioners driving privileges is granted; and it is further

ORDERED that petitioner's driving privileges, as of this date, are to be restored pursuant to *VTL § 510 and 15 NYCRR § 136.5(d)* to the same status as if it had never been determined that she refused to chemical test on July 12, 2015; and it is further

ORDERED that petitioner is directed to serve upon the respondent a copy of this decision and order with notice of entry as soon as practicable.

DECISION

Petitioner made application to the NY State Commissioner of Motor Vehicles for the restoration of her driving privileges pursuant to *15 NYCRR Part 136.*

The Commissioner, as provided by VTL § 510 has adopted a regulation, 15 NYCRR § 136.5 to provide for the uniform consideration of relicensure applications after revocation. This provides in part:

(b) Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that:

> (1) the person has five or more alcohol- or drug-related driving convictions or incidents in any combination within his or her lifetime, then the Commissioner shall deny the application.
>
> (2) the person has ***three*** or four alcohol- or drug-related driving convictions or *incidents* in any combination within the 25 year look back period and, in addition, has one or more serious driving offenses within the 25 year look back period, then the Commissioner shall deny the application.
>
> (3) (i) the person has ***three*** or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period; and
>
> (ii) the person is currently revoked for an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least five years after which time the person may submit an application for relicensing. Such waiting period shall be in addition to the revocation period imposed pursuant to the Vehicle and Traffic Law. After such waiting period, the Commissioner may in his or her discretion approve the application, provided that upon such approval, the Commissioner shall impose the A2 restriction on such person's license for a period of five years and shall require the installation of an ignition interlock device in any motor vehicle owned or operated by such person for such five-year period. Such waiting period shall be extended for an additional five years if the Commissioner finds that the person has any incidents of driving during the waiting period, as indicated by accidents, convictions or pending tickets or adjudications. If such

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license with an A2 restriction is later revoked for a subsequent alcohol- or drug-related driving conviction or incident or for a conviction which arises out of a fatal accident, such person shall thereafter be ineligible for any kind of license to operate a motor vehicle.

(4) (i) the person has ***three*** or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period and

(ii) the person is not currently revoked as the result of an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least two years, after which time the person may submit an application for relicensing. Such waiting period shall be in addition to the revocation period imposed pursuant to the Vehicle and Traffic Law. After such waiting period, the Commissioner may in his or her discretion approve the application, provided that upon such approval, the Commissioner shall impose an A2 restriction, with no ignition interlock requirement, for a period of two years. Such waiting period shall be extended for an additional two years if the Commissioner finds that the person has any incidents of driving during the waiting period, as indicated by accidents, convictions or pending tickets or adjudications. If such license with an A2 restriction is later revoked for a subsequent alcohol- or drug-related driving conviction or incident or for a conviction which arises out of a fatal accident, such person shall thereafter be ineligible for any kind of license to operate a motor vehicle;

(5) the person has ***two*** alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period, then the Commissioner may in his or her discretion approve the application after the minimum statutory revocation period is served.

(6) the person has been twice convicted of a violation of subdivision three, four or four-a of section 1192 of the Vehicle and Traffic Law or of driving while intoxicated or of driving while ability is impaired by the use of a drug or of driving while ability is impaired by the combined influence of drugs or of alcohol and any drug or drugs where physical injury, as defined in section 10.00 of the Penal Law, has resulted from such offense in each instance, then the Commissioner shall deny the application;

(7) the person is otherwise eligible for relicensing under this section, but is applying for relicensing due to revocation arising out of an alcohol-related conviction involving a fatal accident, the Commissioner may approve the application after the minimum revocation period is served, provided that upon such approval, the Commissioner shall impose the A2 restriction on such person's license for a period of three years and shall require the installation of an ignition interlock device in any motor vehicle owned or operated by such person for such period. For the purpose of this paragraph, "alcohol-related conviction" shall mean (i) a conviction of a violation of section 1192 of the Vehicle and Traffic Law, or (ii) a conviction of an offense under the Penal Law for which a violation of section 1192 of the Vehicle and Traffic Law is an essential element.

Respondent, by letter dated December 22, 2017, denied petitioner's application for the restoration of her driving privileges after they had been revoked for a period of one year based upon her alleged refusal to submit to a chemical test on July 12, 2015. This denial was founded upon her two prior convictions for driving while intoxicated that were from 1992 and 1995 and the incident involving her alleged refusal in 2015.

PETITIONER'S UNUSUAL, EXTENUATING AND COMPELLING CIRCUMSTANCES

On February 14, 2018 Petitioner then sent a letter to the Respondent's Driver Improvement Bureau requesting a reversal of the denial of the Petitioner's application as set forth in the Driver Improvement Bureau's letter of December 22, 2017, and for further review of her application due to unusual, extenuating and compelling circumstances.

15 NYCRR § 136.5 further provides:

(d) While it is the commissioner's general policy to act on applications in accordance with this section, ***the commissioner shall not be foreclosed from consideration of unusual, extenuating and compelling circumstances that may be presented for review and which may form a valid basis to deviate from the general policy, as set forth above, in the exercise of discretionary authority granted under sections 510 and 1193 of the Vehicle and Traffic Law.*** If an application is approved based upon the exercise of such discretionary authority, the reasons for approval shall be set forth in writing and recorded. If an approval is granted based upon unusual, extenuating and compelling circumstances, the applicant may be issued a license or permit with a problem driver restriction, as set forth in section 3.2(c)(4) of this Title, and may be required to install an ignition interlock device in any motor vehicle owned or operated by such person for a period of five years.

Petitioner provided the following description of the unusual, extenuating, and compelling circumstances in support of her application:

A. Arresting Officer Was Not Authorized to Demand Petitioner Take a Breath Test

Petitioner advised the respondent that the alcohol incident giving rise to the revocation of her license was her alleged refusal to submit to a blood alcohol test as required by VTL § 1192-4. The circumstances petitioner described were the fact that the charge of Driving While Intoxicated in violation of VTL § 1192-3 had been dismissed upon the Suffolk County District Attorney's representation that petitioner had not operated her vehicle on a *"public highways, private road open to motor vehicle traffic and any other parking lot"* as defined by the VTL § 1192(7), a necessary element of the charge, and therefore a necessary element for a police officer[1] to have reasonable cause to believe such person to have been operating in violation of any subdivision of VTL § 1192.

In the absence of reasonable cause to believe such person to have been operating in violation of any subdivision of VTL § 1192 the officer's request that petitioner submit to a blood alcohol test was not authorized and her alleged refusal should have been of no consequence. These assertions of fact were amply supported by the record submitted by the petitioner and are not reasonably in dispute.

B. Petitioner's Personal Life Circumstances Make Driving a Necessity

Petitioner is fifty-five years of age, recently widowed, a mother, and caretaker of her father who has been diagnosed with leukemia and is now eighty-five years of age. She resides in Kings Park where there is limited public transportation. Petitioner's two alcohol related offenses for driving while intoxicated occurred twenty-two and twenty-five years ago. These assertions of fact were supported with both the death certificate of petitioner's husband, and medical evidence reflecting her father's diagnosis with leukemia.

Denial of Review for Unusual, Extenuating and Compelling Circumstances

Respondent, in a letter dated February 21, 2018, denied Petitioner's application for re-licensing upon its contention that there were ***not*** *unusual, extenuating and compelling circumstances.* Respondent restricted its consideration to the difficulties presented by petitioner's personal life circumstances and never reviewed the uncontested fact that, had all the facts now known been presented to the administrative law judge that issued the revocation order upon petitioner's alleged refusal, there would never have been a revocation. This result would have been consonant with the Suffolk County District Attorney's decision not to prosecute petitioner for *any* offense arising under the Vehicle and Traffic Law.

Petitioner appealed and to the respondent's Appeals Board denied the appeal by letter dated May 29, 2018. The Appeals Board stated "applicant's driving record showed that she had ***three*** alcohol-related driving ***'convictions'*** with no serious driving offenses within the 25-year look

[1] *In this case an New York State Park Police Officer.*

back period." The record contradicts this statement in that Petitioner had only two prior convictions both of which were more than twenty years ago.

It was only petitioner's most recent incident that gave rise to a refusal revocation that is in dispute. Petitioner submitted compelling and uncontested evidence, that had all facts been disclosed to the original administrative law judge petitioner's license would never have been revoked for her alleged refusal to submit to a chemical test. This would have obviated petitioner's need to make a applications to the respondent, appeal the denial of those applications, and seek redress in this court. The respondent may prefer to consider the revocation of petitioner's license to have been completely and finally adjudicated so as to estop petitioner from challenging it now, and in most instances that would be true.

To be absolutely clear. This is ***not*** a case in which petitioner's refusal to consent to a chemical test impaired the evidence necessary for her prosecution and conviction. Instead, it was the independent, verified facts that petitioner had ***not*** been operating a vehicle on a roadway or parking lot that could give rise to an authorized arrest and demand that she submit to a chemical test that gives rise to this inquiry. This court does not know the circumstances or the evidence presented to the administrative law judge that gave rise to the revocation of the petitioner's license. This court does not, and cannot, address the past consequences of that license revocation.

This court, however, cannot and will not ignore the continued consequences of the alleged refusal to submit to a chemical test as demanded upon an unauthorized arrest. Such facts that are not contested should have been the subject of review under *15 NYCRR § 136.5(d)*. The Respondent did not address these facts at all in its decision dated February 21, 2018. The Respondent's Appeals Board similarly did not consider or review the unauthorized demand for a chemical test and subsequent revocation upon the Appeal Board's own review of the decision made under *15 NYCRR § 136.5(d)*. Instead, the Appeal's Board determined such review was barred and the uncontested facts would not be considered in the exercise of its review under *15 NYCRR § 136.5(d)*. The failure to use discretion with respect to the uncontested facts as pertain to the alleged refusal was an error of law and an abuse of discretion. Accordingly, the petition is granted and the petitioner's driving privileges are restored as provided in the orders above.

The foregoing shall constitute the decision and order of the court.

Dated: January 29, 2019

JOHN H. ROUSE, Acting J.S.C.

FINAL DISPOSITION