

[Cite as *Westlake v. Pesta*, 2009-Ohio-4713.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92150

CITY OF WESTLAKE

PLAINTIFF-APPELLEE

vs.

MATTHEW B. PESTA

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Rocky River Municipal Court
Case No. 08 TRC 08143

BEFORE: Stewart, J., Rocco, P.J., and Blackmon, J.

RELEASED: September 10, 2009

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Matthew Pesta, had his driver's license administratively suspended for refusing to take a breath test after being stopped for suspicion of operating a motor vehicle while intoxicated ("OVI") and driving on a lawn or curb. A jury later found Pesta guilty of driving on a lawn or curb, but acquitted him on the OVI charge. Pesta petitioned the court for the restoration of his driving privileges. Plaintiff-appellee city of Westlake opposed the petition, arguing that Pesta had refused to give a breath sample. The court denied the motion without opinion. Pesta appeals, arguing that the court erred by denying his petition for the restoration of his license and driving privileges. We conclude that Pesta did not timely appeal from the administrative license suspension, so we affirm.

{¶ 2} No person may operate a motor vehicle on the public roads or on any private property used by the public without a valid license. R.C. 4510.123(A)(1). The licensed operation of a motor vehicle in this state is a privilege, not a right. *Maumee v. Gabriel* (1988), 35 Ohio St.3d 60, 63. One of the conditions attached to the privilege of being licensed to drive is the operator's consent to chemical or other tests of the operator's blood, urine, or breath if a law enforcement officer has reasonable grounds to believe that the operator had been driving while intoxicated or impaired. See R.C. 4511.191(A)(2). The operator may refuse to take any requested tests, but does so at the peril of losing driving privileges. If the operator of a motor

vehicle refuses to submit to a requested test, the arresting officer must seize the operator's license and immediately administratively suspend the driver's operating privileges. R.C. 4511.192(D)(1). An administrative license suspension goes into effect immediately, and the suspension is not affected by "[a]ny subsequent finding that the person is not guilty of the charge that resulted in the person being requested to take the chemical test or tests * * *." Id.

{¶ 3} A police officer stopped Pesta on suspicion of operating a vehicle while intoxicated. A form signed by Pesta attests that he had been advised of the consequences of a refusal to submit to testing. That same form shows that Pesta refused to submit to testing, so an administrative license suspension was imposed.

{¶ 4} R.C. 4511.197(C) allows an appeal from an administrative license suspension. That appeal is very limited and will only be allowed upon the operator's showing, by a preponderance of the evidence, one of the following grounds: (1) that the arresting officer lacked reasonable cause to believe that the operator has violated R.C. 4511.19(A) or (B); (2) that the law enforcement officer failed to request the arrested person to submit to the testing; (3) that the arresting officer failed to inform the person of the consequences of refusing to take the test; and as applicable in this case, (4) that the arrested

person did not refuse to submit to the chemical test or tests requested by the officer.

{¶ 5} A person charged with operating a motor vehicle while under the influence must be brought to court within five days of arrest or citation. R.C. 4511.191(D)(2). A person placed under an administrative license suspension may appeal that suspension at either the initial appearance on the charge resulting from the arrest or within thirty days after the operator's initial appearance on that charge. See R.C. 4511.197(A). The time limits set forth under R.C. 4511.197(A) are obviously jurisdictional in nature. If an administrative license suspension is not timely appealed, the court has no jurisdiction to consider the appeal.

{¶ 6} The city arraigned Pesta on June 10, 2008. Pesta did not file his petition for reinstatement of his driving privileges until July 23, 2008 – more than 30 days after his initial appearance on the charge. The prima facie evidence shows that Pesta did not comply with R.C. 4511.197(A) and file a timely appeal.

{¶ 7} Pesta substantively argues that he did not refuse to take the breath test. He points to trial testimony by the police officer who conducted the test that Pesta did not verbally refuse to take the test and, in fact, took the test but with an invalid result. He thus maintains that administrative license suspension was incorrectly premised on a failure to submit.

{¶ 8} The city contests Pesta’s characterization of the evidence, arguing that Pesta’s failure to cooperate or otherwise obstruct the testing process constituted a refusal to submit. See, e.g., *Andrews v. Turner* (1977), 52 Ohio St.2d 31 (defendant effected refusal when, after receiving precise instructions on how to provide a breath supply and was given 12 attempts, all attempts were unsuccessful).

{¶ 9} But accepting Pesta’s factual assertions as true does not help him avoid the jurisdictional bar in this case. An administrative license suspension is a civil proceeding separate from any criminal offense. See *State v. Gustafson* (1996), 76 Ohio St.3d 425, 438. The “appeal provisions provide an aggrieved licensee with an adequate means of obtaining prompt post-suspension review of an administrative license suspension.” *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 461.

{¶ 10} The Bureau of Motor Vehicles Form 2255 administrative license suspension shows that Pesta “[r]efused to submit to test(s).” If Pesta disputed this reason for his license suspension, he could have filed an immediate appeal rather than wait for the outcome of the separate criminal proceedings. The appeals process for an administrative license suspension is unrelated to actual guilt on an OVI charge. R.C. 4511.192(D)(1) states that an administrative license suspension goes into effect immediately, and the suspension is not affected by “[a]ny subsequent finding that the person is not

guilty of the charge that resulted in the person being requested to take the chemical test or tests * * *.”

{¶ 11} The administrative license suspension was a proceeding wholly separate from the OVI charge. If Pesta wished to appeal that suspension, he had to do so within 30 days of his arraignment. By failing to file a timely appeal, he deprived the court of jurisdiction to hear the appeal. The assigned error is overruled.

{¶ 12} Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Rocky River Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR