IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Caryl A. Lamoso	:	
	:	
v.	:	No. 1044 C.D. 2009
	:	SUBMITTED: October 30, 2009
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge[1]

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** February 4, 2010

The Department of Transportation, Bureau of Driver Licensing (Department) appeals from an order of the Court of Common Pleas of Monroe County (trial court) sustaining the statutory appeal of Caryl A. Lamoso (Licensee) from a one-year license suspension imposed by the Department for refusing to submit to chemical testing pursuant to Section 1547(b) of the Vehicle Code, *as amended*, 75 Pa. C.S. § 1547(b).[2]

[1] The decision in this case was decided before Senior Judge McCloskey retired on December 31, 2009.

[2] Section 1547(b) provides that when a licensee is placed under arrest for driving under the influence (DUI) and is asked to submit to a chemical test, his or her refusal to do so will result in a 12-month license suspension.

A state trooper (arresting trooper) arrested Licensee for driving under the influence and took her to a chemical testing site to measure her Blood-Alcohol Content (BAC). The arresting trooper read Licensee the required warnings from a DL-26 form,[3] including the consequences of a refusal to submit to testing. Licensee signed the form stating that she was advised of the warnings. Licensee provided a breath sample into an intoxilyzer, registering a .162 blood-alcohol content. Licensee then blew into the intoxilyzer again in order to provide a second sample. During the second sample, Licensee did not blow air continuously for a sufficient amount of time, but rather stopped and started at least fifteen times in two minutes. The intoxilyzer registered that sample as "REFUSED" to submit to testing. Reproduced Record (R.R.) at 44a.

The Department suspended Licensee's license for 12 months as a consequence of her refusal. Licensee filed an appeal with the trial court. At a *de novo* hearing, the arresting trooper testified that during the second breath sample Licensee "would start to breathe and then stop, start and stop continuously." Notes of Testimony (N.T.) at 9; R.R. at 19a. The arresting trooper testified that the intoxilyzer machine printed out a refusal. On cross-examination, the arresting trooper testified that the printout did not indicate a BAC on Licensee's second sample. However, he agreed that the printout also contains two graphs, one for each breath sample, and when looking at the graphs, you could determine two BAC readings. The arresting trooper also agreed that Licensee did not actually refuse to provide a sample. On re-direct examination, the arresting trooper testified

[3] A DL-26 form contains the warnings a police officer must read to an individual suspected of driving under the influence before conducting a chemical test on that individual. *See generally Commonwealth v. McCoy*, ___ Pa. ___, 975 A.2d 586 (2009).

that Licensee's second attempt did not provide a sufficient sample for a long enough period; thus, her second sample was considered a refusal. On re-cross examination, the trooper agreed that there was a BAC reading for the second sample, but that Licensee did not provide a sufficient sample for a sufficient time period.

The trooper who performed the intoxilyzer test (testing trooper) testified that he was a certified breath test operator who has performed hundreds of breath tests. He testified that he tested the intoxilyzer before giving Licensee the test, and the machine was in working order. He further testified that Licensee would have to blow into the machine for thirty seconds continuously, and do so within a two minute period, to register a BAC. He testified that on Licensee's second sample she stopped blowing into the machine so many times that the machine timed out, and registered the second sample as a refusal.

The testing trooper then explained the printout for the intoxilyzer, testifying that the dips in the graph on the printout indicate times when Licensee stopped blowing into the machine. He also testified that the machine emits an intermittent tone when an insufficient sample is being provided, and that he told her to keep blowing into the machine when that tone sounded. He further testified that the graph of the attempted second sample would look different if an adequate sample was provided, and that a second sample is required because the lower of the two samples is considered the BAC of the individual being tested.

On cross-examination, the testing trooper testified that although the second sample reached a certain BAC level on the graph, there was no BAC registered because the second sample was not given for a long enough time to register a valid sample. In responding to the court's question, the trooper stated

that without a second sample, the result is a refusal because a second sample is needed to have a complete test.

After the Department rested, Licensee moved to have the court grant her statutory appeal. The trial court sustained Licensee's appeal, concluding that Licensee provided two breath samples, the breathalyzer did not record the second sample, and the Department did not prove by a preponderance of the evidence that Licensee refused to provide a breath sample. The trial court opined:

> We … recommend to the Appellate Court that machines not determine the facts but that human beings do so. In this matter, [Licensee] was deemed to have refused by a machine even though adequate samples could be read by a human being. [Licensee] was not given a chance to retake the test, nor was she offered a blood test or any other type of blood testing ….

Trial Court's Opinion at 2 (July 8, 2009); R.R. at 58-59a.

On appeal to this Court, the Department argues that the trial court erred as a matter of law in holding that Licensee did not refuse to submit to chemical testing of her breath.

To issue a one-year suspension of a licensee's operating privilege under Section 1547(b)(1) of the Vehicle Code, the Department must prove that (1) the licensee was arrested by a police officer who had "reasonable grounds to believe" the licensee was operating or was in actual physical control of the movement of a vehicle while in violation of Section 3802 of the Vehicle Code, *as amended,* 75 Pa. C.S. § 3802; (2) the licensee was asked to submit to a chemical test; (3) the licensee refused to do so; and (4) the licensee was specifically warned that a refusal would result in the suspension of her operating privileges and would result in enhanced penalties if she was later convicted of violating Section

3802(a)(1). *Martinovic v. Dep't of Transp., Bureau of Driver Licensing*, 881 A.2d 30 (Pa. Cmwlth. 2005).

This Court in *Quick v. Department of Transportation, Bureau of Driver Licensing*, 915 A.2d 1268, 1271 (Pa. Cmwlth. 2007), stated that it is:

> …well-settled that any response from a licensee to a request for a chemical test that is short of an unqualified, unequivocal assent to the requested test constitutes a refusal, subjecting the licensee to the suspension mandated by 75 Pa. C.S. § 1547(b)(1). . . . A licensee's refusal need not be expressed in words; a licensee's conduct may constitute a refusal to submit to testing. . . . The issue of whether a licensee, by his conduct, has refused to submit to chemical testing is one of law, based upon the facts found by the trial court, and is subject to plenary review by this Court. [citations omitted].
>
> This Court has held that a licensee's failure to provide two consecutive sufficient breath samples as required by 67 Pa. Code § 77.24(b) (relating to breath test procedures), absent a proven medical reason that precludes the licensee from so doing, constitutes a refusal of the breath test as a matter of law. *Sweeney v. Department of Transportation, Bureau of Driver Licensing*, 804 A.2d 685, 687 (Pa. Cmwlth. 2002). In *Sweeney*, this Court held that "failure to complete a breathalyzer test, whether or not a good faith effort was made to do so, constitutes a refusal *per se* to take the test." *Id*. (emphasis in original). In *Department of Transportation v. Berta*, . . . 549 A.2d 262, 264 ([Pa. Cmwlth.] 1988), this Court held that licensee's failure to blow sufficient air to successfully complete the breath test constituted a refusal absent medical evidence to establish a physical inability to provide sufficient breath.

Further, the Department may establish that Licensee provided insufficient breath samples by presenting either the testing officer's testimony or a printout from a

properly calibrated breathalyzer indicating a deficient sample. *See Spera v. Dep't of Transp., Bureau of Driver Licensing*, 817 A.2d 1236 (Pa. Cmwlth. 2003). Therefore, the Department is not required to establish that the machine used to perform the chemical test was in working order at the time of the test where other evidence is sufficient to establish that the licensee refused to submit to the test. *Id*.

Here, the two troopers testified that Licensee did not provide an adequate sample because she started and stopped breathing into the breathalyzer during her second sample and the printout from the breathalyzer machine recorded her second sample as a refusal. Licensee contends there is no testimony establishing that the breathalyzer was calibrated, but the testing officer testified that he tested the machine before Licensee's test, and that the machine was working properly. Moreover, under the *Spera* decision, the officers' testimony established sufficient evidence that Licensee's second sample was a refusal regardless of the whether the machine was in working order. There was no testimony that Licensee had a medical condition that prohibited her from completing the breath test, let alone any evidence that she advised the officers of such a condition. Under *Quick*, even if Licensee made a good faith attempt at providing the second sample, her inadequate second sample constitutes a refusal absent testimony establishing that a medical condition prevented her from providing an adequate sample.

The trial court did not make any finding concerning the credibility of the troopers' testimony. N.T. at 25-30; R.R. at 36a-41a. It did, however, find that Licensee provided "two samples and for some reason the machine did not record the second one. I am not seeing a refusal here, so I don't think the Department has proven by a preponderance of the evidence that [Licensee] refused to take the

breath test." *Id*. at 30; R.R. at 41a. Further, in its opinion, the trial court stated: "[w]e thought it interesting that neither [Department] witness would testify that they felt it was a refusal but insisted that the machine determined it be a refusal." Trial Court Opinion at 1; R.R. at 58a. The trial court's determination that Licensee provided a valid second sample is contrary to law. This Court has stated:

> What is determinative of the resolution of this matter is the breathalyzer machine printout. Even when all of the other Code criteria have been met, if the printout from a properly calibrated breathalyzer machine indicates a "deficient sample", without medical proof that the licensee was unable to supply sufficient air, such "deficient sample" constitutes a *per se* refusal.

Dep't of Transp., Bureau of Driver Licensing v. Lohner, 624 A.2d 792, 794 (Pa. Cmwlth. 1993).

Based on the evidence presented by the Department, the Department established a refusal by Licensee to provide an adequate second sample. The trial court erred in concluding that the Department failed to meet its burden. Accordingly, the trial court's order is reversed.

BONNIE BRIGANCE LEADBETTER,
President Judge

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Commonwealth of Pennsylvania,	:	
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Bureau of Driver Licensing,	:	
Appellant	:	

O R D E R

AND NOW, this 4th day of February, 2010, the order of the order of the Court of Common Pleas of Monroe County in the above-captioned matter is hereby REVERSED and the SUSPENSION imposed by the Department of Transportation is hereby REINSTATED.

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BONNIE BRIGANCE LEADBETTER,
President Judge

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	:	Submitted: October 30, 2009
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Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

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HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE LEAVITT FILED: February 4, 2010

Respectfully, I dissent. The trial court found, on the basis of the state trooper's testimony, that Licensee's blood alcohol content could be measured from the two breath samples she produced. Accordingly, it held that Licensee did not refuse to submit to a breathalyzer test, notwithstanding the automated printout from the breathalyzer machine, stating "REFUSED." I would affirm the trial court.

It is uncontested that Licensee provided, as requested, two breath samples. It is also uncontested that the second sample was sufficient to produce the readings necessary for the state trooper to determine her blood alcohol content (BAC). Apparently, the second sample was too challenging for the machine to produce a second BAC reading and for that reason it produced a "refusal." Stated otherwise, a human being was able to do what the machine could not. Faced with this conflict in the evidence, the trial court resolved it in favor of the state trooper's

testimony. This is what fact finders do. Because of her factual finding, the trial court concluded that *Department of Transportation, Bureau of Driver Licensing v. Lohner*, 624 A.2d 792 (Pa. Cmwlth. 1993) was distinguishable, noting wryly that the breathalyzer machine ought to be named "Hal."[1]

The majority relies entirely on *Lohner* for the proposition that "Hal's" conclusion is binding on the fact finder. In *Lohner*, we affirmed the trial court's decision to rely on the breathalyzer machine's conclusion that the breath sample was so inadequate as to constitute a refusal. However, in *Lohner*, there was no evidence that the breath sample produced by the licensee was adequate to produce a BAC reading. *Lohner* is factually distinguishable and not dispositive.

In any case, the reversal ordered by the majority is procedurally incorrect. The majority notes that Licensee did not present evidence that a medical condition prevented her from providing a sufficient air sample. However, Licensee never got this chance because the trial court sustained Licensee's appeal at the conclusion of the Department's case. Even the Department recognized in its brief that should this Court conclude that *Lohner* is dispositive on the merits, then this Court must remand the matter to allow Licensee an opportunity to present her defense.

However, because I would affirm the trial court on the merits, I do not believe a remand is necessary.

_____

MARY HANNAH LEAVITT, Judge

[1] "Hal" refers to the fictional computer in *2001: A Space Odyssey*, an award-winning science fiction film produced in 1968. Hal malfunctioned due to internal contradictions in his programming and attempted to override the ability of the human astronauts to control the spaceship.