

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Phyllis Pollock,	:	
Appellant	:	
	:	
v.	:	
	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	No. 1178 C.D. 2009
Bureau of Driver Licensing	:	Submitted: December 18, 2009

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: January 29, 2010

Phyllis Pollock (Pollock) appeals from the March 26, 2009 order of the Court of Common Pleas of Allegheny County (trial court), dismissing her appeal of the one-year suspension of her driver’s license imposed by the Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (PennDOT) for her refusal to submit to a chemical test pursuant to Section 1547 of the Vehicle Code, 75 Pa.C.S. § 1547. The issue before this Court is whether the trial court erred in dismissing Pollock’s appeal when a blood test taken for medical reasons provided the results upon which her prosecution was based. For the reasons that follow, we affirm the decision of the trial court.

On December 11, 2007, at 1:12 p.m., City of Pittsburgh Police Officer, Brian Sellers, discovered Pollock passed out at the wheel of her car, which was located in a parking lot at 1501 Smallman Street. Officer Sellers and another officer

woke her, but had to remove her from her car and carry her to Officer Sellers' vehicle, since she could not walk. At that time, she smelled of alcohol, and she was unresponsive. Officer Sellers took her to the hospital, where she received emergency medical treatment, which included a blood test. As medical personnel rendered treatment to Pollock, she became loud, boisterous and verbally abusive. After being read the implied consent warning by Officer James Miles, Pollock refused to undergo chemical testing. On December 23, 2007, Officer Sellers obtained the results of Pollock's blood test from the hospital by way of a search warrant. Pollock's blood alcohol content was .303%. On December 26, 2007, Officer Sellers charged her with driving under the influence of alcohol.

By letter mailed January 17, 2008, PennDOT notified Pollock that her driver's license would be suspended for one year, as a result of her refusal to undergo chemical testing. Pollock appealed the suspension to the trial court. Following a hearing on January 29, 2009, the trial court dismissed Pollock's appeal. No appeal was timely filed from that order. By letter mailed April 17, 2009, Pollock was again notified that her license was being suspended for a year. On May 5, 2009, Pollock requested leave to appeal *nunc pro tunc* to this Court.¹ Pollock also filed an application for supersedeas. The trial court held a hearing limited to those issues and, thereafter, granted both requests. Pollock filed an appeal to this Court.²

¹ PennDOT asks this Court to affirm the trial court's decision or, in the alternative, find that the trial court erred by granting Pollock's appeal *nunc pro tunc*. Pollock's reply brief, likewise, addresses whether the trial court erred by granting Pollock's appeal *nunc pro tunc*. We affirm the trial court's decision on the merits of the case and, therefore, do not address whether the trial court properly granted Pollock's appeal *nunc pro tunc*.

² This Court's scope of review in a license suspension case is limited to determining whether the trial court's findings of facts are supported by competent evidence and whether the trial court committed an error of law or an abuse of discretion. *Orloff v. Dept. of Transp., Bureau of Driver Licensing*, 912 A.2d 918 (Pa. Cmwlth. 2006).

Pollock argues that because the purpose of the Implied Consent Law³ was ultimately realized, her refusal to submit to testing upon the officer's request was irrelevant, so her license need not be suspended. We disagree.

Section 1547(b)(1)(i) of the Vehicle Code, 75 Pa.C.S. § 1547(b)(1)(i), commonly referred to as the "Implied Consent Law," authorizes PennDOT to suspend for one year the driving privileges of a licensee who is placed under arrest for driving under the influence of alcohol, and who refuses a police officer's request to submit to chemical testing. In order to maintain a license suspension under Section 1547 of the Vehicle Code, PennDOT has the burden of proving that:

(1) the licensee was arrested for drunken driving by a police officer who had reasonable grounds to believe that the motorist was operating a motor vehicle while under the influence of alcohol; (2) the licensee was requested to submit to a chemical test; (3) the licensee refused to submit; and (4) the licensee was warned that refusal would result in a license suspension.

Broadbelt v. Dep't of Transp., Bureau of Driver Licensing, 903 A.2d 636, 640 (Pa. Cmwlth. 2006).

In the present case, there is no dispute that PennDOT met its burden of proof. Pollock was arrested for driving under the influence of alcohol on December 11, 2007, she was asked to submit to chemical testing after having been warned that refusal would result in suspension of her license, and she refused.⁴ The only issue is

³ Section 1547(b)(1)(i) of the Vehicle Code, 75 Pa.C.S. § 1547(b)(1)(i).

⁴ We note that: "In determining whether an officer had reasonable grounds to believe that a motorist was in 'actual physical control' of a vehicle, the court must consider the totality of the circumstances, including the location of the vehicle, whether the engine was running and whether there was other evidence indicating that the motorist had driven the vehicle at some point prior to the arrival of the police." *Solomon v. Dept. of Transp., Bureau of Driver Licensing*, 966 A.2d 640, 642 (Pa. Cmwlth., 2009) (citing *Banner v. Dept. of Transp., Bureau of Driver Licensing*, 558 Pa. 439, 446-447, 737 A.2d 1203, 1207 (1999)). In the present case, however, Pollock does not dispute that the officer had reasonable grounds under the circumstances to believe Pollock had been operating her vehicle while under the influence.

whether PennDOT was authorized to suspend her license pursuant to Section 1547 of the Vehicle Code when the police were otherwise able to obtain her blood alcohol level.

The Pennsylvania Supreme Court has stated that “driving is not a property right; rather it is a privilege. To obtain the benefit of such a privilege, a driver must abide by the laws of the Commonwealth relating to the privilege.” *Commonwealth v. Zimmick*, 539 Pa. 548, 559, 653 A.2d 1217, 1222-23 (1995).

Where the driver refuses to take a [chemical] test, that refusal violates a condition for the continued privilege of operating a motor vehicle and is properly considered as a basis for suspension of that privilege. . . . The only fact necessary to the administrative determination is the driver’s refusal to comply with the [chemical test] request after being taken into custody.

Dep’t of Transp., Bureau of Driver Licensing v. Wysocki, 517 Pa. 175, 180, 535 A.2d 77, 79 (1987). Moreover, Section 3755(a) of the Vehicle Code, 75 Pa.C.S. § 3755(a) provides:

If, as a result of a motor vehicle accident, the person who drove, operated or was in actual physical control of the movement of any involved motor vehicle requires medical treatment in an emergency room of a hospital and if probable cause exists to believe a violation of section 3802 (relating to driving under influence of alcohol or controlled substance) was involved, the emergency room physician or his designee shall promptly take blood samples from those persons and transmit them within 24 hours for testing to the Department of Health or a clinical laboratory licensed and approved by the Department of Health and specifically designated for this purpose. . . . Test results shall be released upon request of the person tested, his attorney, his physician or governmental officials or agencies.

In *Dep’t of Transp., Bureau of Traffic Safety v. Emory*, 498 A.2d 26 (Pa. Cmwlth. 1985), this Court addressed the very issue raised by Pollock here. This Court held:

that the withdrawal of a blood sample under the authority of Section 3755 of the [Vehicle] Code does not bar [Penn]DOT from suspending an operator's license where the operator refuses a request for a blood test by an arresting officer who has complied with the mandatory provisions of Section 1547.

Id. at 29. This Court restated that position in *Podgurski v. Dep't of Transp., Bureau of Driver Licensing*, 654 A.2d 232 (Pa. Cmwlth. 1995) (wherein this Court held that a police officer was not prohibited from requesting that a driver submit to blood alcohol test for purposes of the Implied Consent Law, even though the driver's blood had already been drawn pursuant to Section 3755). While Sections 3755 and 1547 of the Vehicle Code are intended to reduce drunk driving in the Commonwealth, they operate completely independently of one another. *Emory*, 498 A.2d at 29.

Pollock acknowledges *Emory* and *Podgurski*, but argues that since the Pennsylvania Supreme Court has never examined this issue, and the most recent case to address it is fourteen years old, this Court should revisit its well-settled position. In support of her position, Pollock cites *Hart v. Dep't of Motor Vehicles*, 240 Cal. Rptr. 373 (1987). *Hart*, however, is a 22-year-old California appellate case which is unreported and, therefore, not precedential even in California. We decline to follow *Hart*. The trial committed no error in following the long-standing precedent set by this Court.

Accordingly, the order of the trial court is affirmed.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 29th day of January, 2010, the March 26, 2009 order of the Court of Common Pleas of Allegheny County is affirmed.

JOHNNY J. BUTLER, Judge