

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas J. Codelka,	:
Appellant	:
	:
v.	:
	:
Commonwealth of Pennsylvania,	No. 119 C.D. 2008
Department of Transportation,	No. 120 C.D. 2008
Bureau of Driver Licensing	Submitted: May 2, 2008
	:

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: September 5, 2008

In these consolidated appeals,¹ Thomas J. Codelka appeals from two orders of the Court of Common Pleas of Washington County (trial court) dated December 21, 2007 denying his appeals and reinstating two separate one year suspensions of his operating privileges. We affirm.

By Official Notice of Suspension mailed May 21, 2007, the Department of Transportation, Bureau of Driver Licensing (DOT) informed Codelka that his operating privilege, as authorized by Section 1547(b)(1)(i) of the Vehicle Code,² was being suspended for one year as a result of his violation of

¹ These appeals were consolidated by order of this Court entered on April 29, 2008.

² 75 Pa.C.S. §1547(b)(1)(i). Section 1547(b)(1)(ii) provides, in relevant part:

(Continued....)

Section 1547 of the Vehicle Code³ for refusing to submit to a chemical test on April 29, 2007. By Official Notice of Disqualification mailed May 21, 2007, DOT informed Codelka that his commercial operating privilege, as authorized by Section 1613 of the Uniform Commercial Driver's License Act⁴ was being

(b) Suspension for refusal.—

(1) If any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person as follows:

(i) Except as set forth in subparagraph (ii), for a period of 12 months.

³ 75 Pa.C.S. §1547. Section 1547(a) provides as follows:

(a) GENERAL RULE.-- Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle:

(1) in violation of section 1543(b)(1.1) (relating to driving while operating privilege is suspended or revoked), 3802 (relating to driving under influence of alcohol or controlled substance) or 3808(a)(2) (relating to illegally operating a motor vehicle not equipped with ignition interlock); or

(2) which was involved in an accident in which the operator or passenger of any vehicle involved or a pedestrian required treatment at a medical facility or was killed.

⁴ 75 Pa.C.S. §1613. Section 1613 governs implied consent requirements for commercial motor vehicle drivers and provides as follows:

(a) IMPLIED CONSENT.-- A person who drives a commercial motor vehicle in this Commonwealth is deemed to have given consent to take a test or tests of the person's breath, blood or urine for the purpose of determining the person's alcohol concentration or the presence of other controlled substances.

(Continued....)

(b) TESTS ORDERED BY POLICE OFFICER.-- A test or tests may be administered at the direction of a police officer who, after stopping or detaining the commercial motor vehicle driver, has reasonable grounds to believe that the driver was driving a commercial motor vehicle while having any alcohol in his system.

(c) WARNING AGAINST REFUSAL.-- A person requested to submit to a test as provided in subsection (a) shall be warned by the police officer requesting the test that refusal to submit to the test will result in the person's being disqualified from operating a commercial motor vehicle under subsection (e).

(d) REPORT ON TEST REFUSAL.-- If the person refuses testing, the police officer shall submit a sworn report to the department certifying that the test was requested pursuant to subsection (a) and that the person refused to submit to testing.

(D.1) DISQUALIFICATION FOR REFUSAL.-- Upon receipt of a report of test refusal, the department shall disqualify the person who is the subject of the report for the same period as if the department had received a report of the person's conviction for violating one of the offenses listed in section 1611(a) (relating to disqualification). A person who is disqualified as a result of a report of test refusal that originated in this Commonwealth shall have the same right of appeal as provided for in cases of suspension. Where the report of test refusal originated from another state or other foreign jurisdiction, the review of a court on an appeal from a disqualification under this subsection shall be limited to whether the department has received a report of refusal and whether the person has successfully established one of the following defenses:

(1) The person being disqualified is not the one identified in the report.

(2) The person has successfully contested the report in the jurisdiction from which it originated.

(3) The department has erred in determining the length of the disqualification to be imposed as a result of the report of test refusal.

(D.2) LIMITATION ON NONCOMMERCIAL MOTOR VEHICLE-BASED REFUSAL.—A report of test refusal which occurred prior to the effective date of this subsection and which

(Continued....)

suspended for one year as a result of his violation of Section 1547 of the Vehicle Code for refusing to submit to a chemical test on April 29, 2007.

Codelka appealed both suspensions to the trial court which conducted a trial *de novo*. Codelka testified on his own behalf before the trial court. DOT presented the testimony of Sergeant Gerald Maloni who was employed by the Peters Township Police Department as a patrol officer. DOT also submitted into evidence, without objection, documentary evidence consisting of DOT Form DL-26 and Codelka's certified driving record.

did not involve a commercial motor vehicle shall not be considered by the department for purposes of applying a disqualification pursuant to this section.

(D.3) DEFINITION.-- As used in this section, the term "report of test refusal" shall mean the following: (1) A report of a police officer submitted to the department that a person refused to submit to testing requested under this section.

(2) A notice by a police officer to the department of a person's refusal to take a test requested pursuant to section 1547 (relating to chemical testing to determine amount of alcohol or controlled substance) where the person was a commercial driver at the time relevant to the refusal.

(3) Any document, including an electronic transmission, submitted to the department from a court of competent jurisdiction indicating that a person was convicted of an offense that involves the refusal to submit to testing for alcohol or controlled substances where the person was a commercial driver at the time of the violation.

(4) Any document, including an electronic transmission, submitted to the department from a court, administrative tribunal, administrative agency or police officer or other agent of another state or other foreign jurisdiction indicating that a person refused to take a test requested to aid enforcement of a law against driving while under the influence of alcohol or a controlled substance where the person was a commercial driver at the time relevant to the refusal.

Sergeant Maloni testified that on April 29, 2007, he was following a Chevy sedan that was speeding approximately fifteen miles over the speed limit and that swerved over the center line approximately seven times. See Transcript of Hearing Held December 21, 2007, Reproduced Record (R.R.) at 8a. Sergeant Maloni testified that he stopped the vehicle and identified Codelka as the operator. Id. Sergeant Maloni testified that Codelka had slurred speech, glassy eyes, a flushed face, and a smell of alcohol on his breath. Id. Sergeant Maloni testified that there was also an open case of beer on the front seat of Codelka's vehicle. Id. Sergeant Maloni testified further that he asked Codelka to perform field sobriety tests and gave him a preliminary breath test. Id. at 8a-9a. Sergeant Maloni testified that Codelka failed all the field sobriety tests and that he arrested Codelka for driving under the influence.⁵ Id. at 9a. Sergeant Maloni testified that he transported Codelka to the police station for a breath test. Id.

Sergeant Maloni testified that he advised Codelka of the Implied Consent Law warnings which were printed on the wall beside the breath testing device. Id. at 10a. Sergeant Maloni testified after he advised Codelka of the warnings, he asked Codelka if he would take the breath test but Codelka refused. Id. Sergeant Maloni testified that Codelka indicated to him that Codelka believed that he had already taken a breath test. Id. at 17a. Sergeant Maloni testified that he explained to Codelka that the breath test that was earlier administered at the traffic stop was just a preliminary breath test to determine whether there was probable cause to arrest Codelka for driving under the influence. Id. at 17a-18a.

⁵ Codelka was charged with violating Section 3802 of the Vehicle Code, 75 Pa.C.S. §3802, which prohibits an individual from driving, operating, or being in actual physical control of a motor vehicle while under the influence of alcohol or a controlled substance.

Sergeant Maloni testified that he read all of the chemical test warnings verbatim to Codelka from the DOT Form DL-26. Id. at 10a. Sergeant Maloni testified that after he read the warnings verbatim to Codelka, he again asked Codelka if he was willing to submit to a breath test but Codelka again refused. Id. at 11a. Sergeant Maloni testified further that he asked Codelka to reconsider but Codelka again refused to submit to the breath test. Id. at 13a. Sergeant Maloni marked a refusal on the DOT DL-26 Form. See Original Record (O.R.), Commonwealth Exhibit 1. Finally, Sergeant Maloni testified that he did not recall Codelka suggesting that he would be willing to provide a blood test. R.R. at 18a.

Codelka testified that he did willingly perform a field breath test and that Sergeant Maloni never explained that the field breath test did not count as chemical testing. Id. at 21a. Codelka testified that he was placed under arrest and transported to the police department where he was instructed to take another breathalyzer test. Id. at 22a. Codelka testified that he told Sergeant Maloni that he believed that he had already taken a breathalyzer test and asked to be transported to the hospital to take a blood test because he believed that was the most accurate test for blood alcohol. Id. at 22a-23a.

Codelka testified further that he did not believe that he refused to be chemically tested. Id. at 23a. Codelka also testified that Sergeant Maloni actually read him the warnings from the DOT Form DL-26 but that Codelka did not sign any papers. Id. Codelka testified that he informed Sergeant Maloni that he was not refusing to have blood drawn for chemical testing. Id. at 24a. Finally, Codelka testified that he informed Sergeant Maloni that he had already taken a breathalyzer test and that he would submit to a blood alcohol test by drawing blood at the hospital. Id. Codelka did not testify that he was confused by warnings actually

given to him by Sergeant Maloni or by any warnings posted on the wall at the police department.

At the conclusion of the trial *de novo*, the trial court denied Codelka's appeals and reinstated the suspensions of his operating privileges. Id. at 36a. Thereafter, the trial court issued two separate orders on December 21, 2007 memorializing its decisions. In an opinion, written pursuant to Pa.R.A.P. 1925(a),⁶ in support of its orders, the trial court determined as follows:

[Codelka] asserted that he was confused about the refusal to take a Breathalyzer test at the police station for two (2) reasons. First, Officer Maloni gave Mr. Codelka a portable breath test at the scene of his arrest, and second, a posted document underneath a cabinet in the police station caused him confusion. This Court did not find [Codelka's] position credible as the arresting officer specifically read the required warnings from the DL-26 Form and he explained to Mr. Codelka that the on scene portable test was not the required Breathalyzer. [Codelka] was properly advised that refusal to take the Breathalyzer would result in the suspension of his operating privileges. Based on the foregoing, this Court

⁶ Rule 1925(a) provides as follows:

(a) General rule.--Upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or shall specify in writing the place in the record where such reasons may be found.

If the case appealed involves a ruling issued by a judge who was not the judge entering the order giving rise to the notice of appeal, the judge entering the order giving rise to the notice of appeal may request that the judge who made the earlier ruling provide an opinion to be filed in accordance with the standards above to explain the reasons for that ruling.

denied Mr. Codelka's appeal[s] and reinstated the suspensions.

Trial Court Opinion at 2-3; R.R. at 39a-40a. These appeals followed.⁷

Herein, Codelka raises the issue of whether the trial court erred when it failed to determine that the conspicuously "posted statement" at the police station of the chemical test warnings was misleading and overtly confused Codelka, which statement was read to Codelka by the police officer before any chemical testing was conducted that ambiguously stated Codelka's rights under the Implied Consent Law.

In order to support a one-year suspension of operating privileges imposed in conformity with Section 1547(b) as a consequence of a chemical test refusal related to an arrest for violating Section 3802 of the Vehicle Code, 75 Pa. C.S. §3802, DOT must establish that 1) the licensee was arrested for violating Section 3802 ; 2) by a police officer who had reasonable grounds to believe that the licensee was operating a vehicle while in violation of Section 3802; 3) that the licensee was requested to submit to a chemical test; 4) that the licensee refused to do so; and 5) that the police officer fulfilled the duty imposed by Section 1547(b)(2) by advising the licensee that his operating privileges would be suspended if he refused to submit to chemical testing and that, in the event the licensee pleaded guilty or nolo contendere to or was found guilty of violating

⁷ Our scope of review in an operating privilege suspension case is confined to determining whether the trial court's findings are supported by competent evidence, whether errors of law have been committed, or whether the trial court's determinations demonstrate a manifest abuse of discretion. Department of Transportation, Bureau of Driver Licensing v. Ingram, 538 Pa. 236, 648 A.2d 285 (1994). Questions of credibility and conflicts in the evidence presented are for the trial court to resolve. Id. If there is sufficient evidence in the record to support the findings of the trial court we must pay proper deference to it as fact finder and affirm. Id.

Section 3802(a)(1) after refusing testing, the licensee would be subject to the penalties set forth in Section 3804(c). Martinovic v. Department of Transportation, Bureau of Driver Licensing, 881 A.2d 30, 34 (Pa. Cmwlth. 2005). Clearly, DOT is charged with the same burden in order to support a one-year suspension of operating privileges imposed in conformity with Section 1613 of the Uniform Commercial Driver's License Act as a consequence of a chemical test refusal related to an arrest for violating Section 3802 of the Vehicle Code. Once the DOT meets its burden, it is the licensee's responsibility to prove that he was not capable of making a knowing and conscious refusal to take the chemical test. Id.

In support of his appeal, Codelka first argues that he did not make a knowing and conscious refusal to submit to chemical testing because he was confused by the reading of two versions of the Implied Consent Law by the arresting officer. Codelka contends that the warnings posted on the wall in the police department that the arresting officer initially read to him incorrectly rephrased the actual warnings contained in the Implied Consent Law. Codelka alleges that the warnings posted on the wall stated, in part, that "I am requesting that you take a breath or blood test." Codelka argues further that when the actual Implied Consent Law was read to him by the arresting officer, which clearly stated that "any person shall be deemed to have given consent to one or more chemical tests of breath, blood or urine," he became confused as to which test he was being required to submit to. In short, Codelka asserts that the two versions of the Implied Consent Law by the arresting officer caused him to become confused and as a consequence of this confusion, he believed that since he had already given a breath test at the scene of the traffic stop, his offer to give blood would be acceptable.

Initially, we note that Codelka did not testify that he experienced any confusion as a result of the reading of the warnings posted on the wall in the police department and the subsequent reading of the warnings as contained in DOT Form DL-26. See R.R. at 20a-24a. In fact, Codelka never mentions the warnings posted on the wall in the police department in his entire testimony. Id. Codelka only testified with respect to the warnings as contained on the DOT Form DL-26 wherein he stated that the arresting officer read him the actual warnings as contained on that form. Id. at 23a. As such, we reject Codelka's meritless argument that he did not make a knowing and conscious refusal based on the foregoing alleged confusion. Moreover, we point out that although counsel for Codelka showed the arresting officer a document that purported to be the actual warnings posted on the wall in the police department, that document was not made part of the certified record in this case. It is well settled that an appellate court cannot consider anything which is not part of the certified record in a case. Smith v. Smith, 637 A.2dd 622, 623-24 (Pa. Super. 1993), petition for allowance of appeal denied, 539 Pa. 680, 652 A.2d 1325 (1994); See also Fotta v. Workmen's Compensation Appeal Board (U.S. Steel/USX Corporation Maple Creek Mine), 534 Pa. 191, 196 n.2, 626 A.2d 1144, 1147 n.2 (1993) ("[T]he report is not part of the record and our review is limited to the evidence contained in the record. Humphrey v. W.C.A.B. (Super Market Service), [514 A.2d 246, 251 (Pa. Cmwlth. 1986].").

We now turn to Codelka's argument that he did not refuse to submit to chemical testing. Codelka contends that because he believed that he had already given a breath test at the scene, his offer to submit to a blood test should have been accepted and a refusal to submit to chemical testing should not have been recorded. This argument is also without merit.

The completion of a preliminary breath test does not satisfy a licensee's obligation under the Implied Consent Law. Ryan v. The Department of Transportation, Bureau of Driver Licensing, 823 A.2d 1101 (Pa. Cmwlth. 2003). Self-created confusion about what the law is or ought to be is insufficient to sustain a licensee's burden to prove that he was not capable of making a knowing and conscious refusal to take the chemical test. Ryan; Kromelbein v. The Department of Transportation, Bureau of Driver Licensing, 637 A.2d 728 (Pa. Cmwlth. 1994); Appeal of Attleberger, 583 A.2d 24 (Pa. Cmwlth. 1990), appeal dismissed, 531 Pa. 450, 613 A.2d 1203 (1992).

In the present matter, the arresting officer administered a pre-arrest breath test at the scene of the traffic stop. Sergeant Maloni testified that he explained to Codelka that the breath test that was administered when Sergeant Maloni pulled Codelka's vehicle over was just a preliminary breath test to determine whether there was probable cause to arrest Codelka for driving under the influence. Id. at 17a-18a. Sergeant Maloni testified that he read all of the chemical test warnings verbatim to Codelka from the DOT Form DL-26. Id. at 10a. Sergeant Maloni testified that after he read the warnings verbatim to Codelka, he again asked Codelka if he was willing to submit to a breath test but Codelka again refused. Id. at 11a. Sergeant Maloni testified further that he asked Codelka to reconsider but he again refused to submit to the breath test. Id. at 13a. Finally, Sergeant Maloni testified that he did not recall Codelka suggesting that Codelka would be willing to provide a blood test. R.R. at 18a.

To the contrary, Codelka testified that Sergeant Maloni never explained that the field breath test did not count as chemical testing. Id. at 21a. Codelka testified further that he did not believe that he refused to be chemically tested. Id. at 23a. Codelka also testified that Sergeant Maloni actually read him

the warnings but that Codelka did not sign any papers. Id. Codelka testified that he informed Sergeant Maloni that he was not refusing to have blood drawn for chemical testing. Id. at 24a. Finally, Codelka testified that he informed Sergeant Maloni that he had already taken a breathalyzer test and that he would submit to a blood alcohol test by drawing blood at the hospital. Id.

In ruling on the weight and credibility of the evidence,⁸ the trial court specifically stated that it did not find Codelka's position credible as the arresting officer specifically read the required warnings from the DOT Form DL-26 and that the arresting officer explained to Codelka that the on scene portable breath test was not the required breathalyzer. The trial court found further that Codelka was properly advised that the refusal to submit to the breathalyzer would result in the suspension of his operating privileges.

Accordingly, we conclude that any confusion experienced by Codelka as to whether he was required to submit to a post-arrest breathalyzer pursuant to the Implied Consent Law was self-created. See Ryan, 823 A.2d at 1104 ("As in Attleberger, any confusion as to the responsibility to submit to the second type of test arose not from statements made by the police officer but solely from Licensee's 'self-induced and self-destructive confusion about what the law is or should be.' 583 A.2d at 27.). The trial court's orders are affirmed.

JAMES R. KELLEY, Senior Judge

⁸ It is well settled that determinations as to the credibility of witnesses and the weight assigned to their testimony are solely within the province of the fact finder. Millili v. Department of Transportation, Bureau of Driver Licensing, 745 A.2d 111 (Pa. Cmwlth. 2000).

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Commonwealth of Pennsylvania,	:
Department of Transportation,	:
Bureau of Driver Licensing	:

ORDER

AND NOW, this 5th day of September, 2008, the orders of the Court of Common Pleas of Washington County entered in the above captioned matters are affirmed.

JAMES R. KELLEY, Senior Judge