IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jeffrey Dunbar Reiff, Appellant	:	
v.	:	
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing	:	No. 1329 C.D. 2007
	:	Submitted: January 11, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: February 8, 2008

Jeffrey Dunbar Reiff (Reiff) appeals from the order of the Court of Common Pleas of Berks County (trial court) that denied Reiff's appeal from his eighteen month suspension of his operating privilege pursuant to Section 1547(b)(1) of the Vehicle Code (Code), 75 Pa.C.S. § 1547(b)(1).[1] This Court affirms.

[1] Section 1547(b)(1) of the Code provides:

> (b) Suspension for refusal –
>
> (1) If any person placed under arrest for a violation of section 3802 [relating to driving under the influence of alcohol or controlled substance] 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 . . . (ii) For a period of 18 months. . . . .

By official notice dated February 2, 2007, the Department of Transportation, Bureau of Driver Licensing (DOT) informed Reiff that his driving privilege was being suspended for a period of eighteen months, effective March 9, 2007, because of his refusal to submit to chemical testing on January 5, 2007, pursuant to 75 Pa.C.S. § 1547(b)(1)(ii). On February 22, 2007, Reiff filed an appeal to the trial court. After hearing on June 21, 2007, the appeal was denied. Reiff filed a Notice of Appeal to the Commonwealth Court on July 12, 2007, and was ordered by the trial court on July 16, 2007, to file a concise statement of matters complained of on appeal. The trial court issued a memorandum opinion on October 10, 2007, requesting this Court affirm the trial court's order.

The facts are summarized by the trial court as follows:

> [O]n January 5, 2007, Officer Chad Marks, a police officer with the Borough of West Reading Police Department assigned to patrol duty, was traveling westbound in the 400 block of Franklin Street, Berks County, Pennsylvania, when he noticed that a vehicle had to swerve into another lane of on-coming traffic to go around a vehicle that was in the travel lane. The officer drove up to an intersection where he observed this vehicle make a quick right turn and pull out, skidding its tires. Officer Marks attempted to pull the vehicle over, but it would not stop. A chase ensued down several streets; then the vehicle made another right turn into a parking lot. The officer advised Berks Radio that he stopped the vehicle in this location and requested back-up. Officer Marks identified [Reiff] as the operator of the vehicle he stopped. [Reiff] was asked if he had been drinking alcoholic beverages prior to operating the motor vehicle. [Reiff] said, "Well, what do you think?" [Reiff] was subsequently arrested after Officer Marks noticed that he was emitting a very strong odor of alcohol. [Reiff] swore at the police and an EMS. He refused to go to the hospital by ambulance so he was transported to the

> Berks County DUI Processing Center by the police. Once at the center, Officer Marks removed the handcuffs and read [Reiff] the DL-26 chemical testing warnings. [Reiff] agreed at this point to take the chemical test and he signed the form.
>
> Detective Robert Johnson, Jr., an employee of the Spring Township Police Department, was working at the Berks County DUI Processing Center when [Reiff] was brought in on January 5, 2007 and turned over. Detective Johnson was the detective in charge of testing [Reiff]. He took custody of [Reiff] with the intent to draw blood. DOT played a videotape of the proceedings after the warnings were read in which [Reiff] stated that he wasn't going to cooperate to have the blood drawn. [Reiff] stated that he wanted his sister present. [Reiff] concedes, in his concise statement, that he would assent "so long as his sister could be present during the blood draw." (internal citations omitted).

Court of Common Pleas of Berks County Memorandum Opinion, October 10, 2007, (Trial Court Opinion) at 3-4. Reiff's license was suspended. Reiff now appeals.

Reiff contends[2] that he did not make a knowing and voluntary decision to refuse to submit to the blood test. In order to sustain a license

[2] This Court's standard of review is limited to determining whether necessary findings are supported by competent evidence of record and whether the trial court committed an error of law or abused its discretion. Berman v. Department of Transportation Bureau of Driver Licensing, 842 A.2d 1025 (Pa.Cmwlth. 2004). Whether a licensed motorist has refused a chemical test is a question of law subject to plenary review. 75 Pa.C.S. §1547. The specific issue of whether a licensee's refusal of a chemical test in violation of 75 Pa.C.S. § 1547 was knowing and conscious is one of fact for determination by the trial court, and must be supported by substantial evidence. Ponce v. Department of Transportation, Bureau of Driver Licensing, 685 A.2d 607 (Pa.Cmwlth. 1996), petition for allowance of appeal denied 548 Pa. 641, 694 A.2d 625 (1996).

suspension pursuant to 75 Pa.C.S. § 1547, DOT must establish that: (1) the licensee was arrested for drunken driving by a police officer with 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. Lemon v. Department of Transportation, Bureau of Driver Licensing, 763 A.2d 534 (Pa.Cmwlth. 2000). Once the burden has been met by DOT, the licensee may escape suspension by establishing that a refusal was not knowing or conscious, or that the licensee was physically unable to take the test. Berman v. Department of Transportation, Bureau of Driver Licensing, 842 A.2d 1025 (Pa.Cmwlth. 2004).

Central to Reiff's argument is the question whether he was rendered mentally or physically incompetent such that he could not knowingly and consciously refuse the test. Required for this determination is a further exposition of the underlying facts.

The arresting officer, Officer Chad T. Marks (Officer Marks) testified:

> I observed the vehicle make a quick right turn and pull out, skid its tires because it was wet outside. I attempted to initiate a traffic stop. . . . The vehicle was not stopping. I chased the vehicle down Cherry Street. And then we turned onto Sixth Avenue, and went to Sixth and Franklin, made a right turn into the parking lot. . . .
> . . . .
> The operator of the vehicle . . . exited the vehicle. I drew down on him. I ordered [Reiff] to the ground. [Reiff] told me no. He turned around and began to walk away from me. I holstered my gun, pulled out my taser. I advised him to get on the ground or he would be tasered.

> And he told me to fuck off. And that's when I tasered him.
>
> . . . .
>
> He was taken to the ground for the five seconds of being tasered. I ordered him – he was on his stomach. I ordered him to put his hands behind his back. He was rolling around telling me to fuck off. He was trying to pull the probes out of his back. I tasered him again for another five seconds. And this continued on two more times until he finally complied with my verbal commands to put his hands behind my [sic] back.
>
> . . . .
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> After he was taken into custody, I requested EMS to respond. I approached [Reiff]. And at that time, I asked him if he was all right. And I told him that we were going to have an ambulance come check him out for his injuries because I could see that he was bloody on the face from falling on the sidewalk. At that point, I could – I noticed a very strong odor of alcoholic beverages come from his breath. I asked him if he had been drinking alcoholic beverages prior to operating the motor vehicle. And he said to me, well, what do you think.
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> . . . .
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> EMS had responded. EMS had asked him if he wanted to be transported to the hospital. He told them to fuck off. And I then placed him in the back of the police car, told him I'd be taking him to the Berks County DUI processing center. (emphasis added).

Notes of Testimony, June 21, 2007 (N.T.), Reproduced Record (R.R.) at 2A-5A. It is uncontested that, when offered, Reiff refused medical treatment. Also of note is Reiff's history of poor judgment with respect to adherence to the Code.[3]

[3] This Court notes that, since 1978, Reiff has a driving history that includes 1978 'chemical test refusal,' 'driving under the influence' offense, '90 mph in a 40 mph zone,' and a 'red light violation,' all in the same occurrence, a 1982 '47 mph in a 35 mph zone' offense, a 'red light violation,' and a 'failure to obey at a railroad offense,' occurring on different dates, a 1983 'driving under the influence' offense, a 1986 'reckless driving offense,' a 'chemical test refusal' and a 'too fast for conditions' offense in 1987, a 'failure to provide "fr-accid,"' undated, a 1987 'leaving the scene of an accident' offense, a 1995 'careless driving' and 'leaving the scene of an accident' offense, a 2002 'driving under the influence' offense, and the current **(Footnote continued on next page…)**

Reiff offered the testimony of Michael J. Leagans (Leagans), a pastor, neighbor, and former paramedic, who witnessed the altercation after Reiff was pulled over. Leagans testified that he was familiar with the symptoms of a concussion, but was forty-five to fifty feet away from the incident, and did not have a chance to examine Reiff at the time of the event. N.T. at 25-33; R.R. at 17A-20A.

Reiff also offered the testimony of his sister, Doreen Johnson (Johnson). Johnson testified that she had gone to the courthouse to pick Reiff up, and found him walking in the street, about three feet from the curb.

> [H]e was not processing what I was saying. He was – he was fixated on looking at his hands. And he was not processing the questions or being able to answer them for me to know what his wellbeing was at that point or why he was even walking down the street. He didn't know how he – I had asked him how he got out of the courthouse and he didn't know.

N.T. at 33-37; R.R. at 20A-22A.

Once the Bureau has established its prima facie case, the burden shifts to Reiff to prove that he was physically incapable of completing the test, or that his refusal was not knowing or conscious. King v. Department of Transportation, Bureau of Driver Licensing, 828 A.2d 1 (Pa.Cmwlth. 2002), petition for allowance

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(continued…)

offense. Certified Driving History of Jeffrey Dunbar Reiff, August 31, 2007, Appendix B to Answer to Petition to Stay and Hold License Suspension in Abeyance Pending Appeal with Proof of Service, Certified Record at 15; Appendix A to Respondent's Brief at 22b-28b.

of appeal denied, 577 Pa. 738, 848 A.2d 931 (2002), cert. denied, 538 U.S. 1034 (2003). Again, it is for the trial court to determine whether, based on the facts, the refusal was knowing or conscious. According to Officer Marks's testimony, Reiff actually consented to the testing, and signed his name to that effect. N.T. at 14-15; R.R. at 10A-11A.

A driver's self-serving testimony in a license suspension proceeding that he was incapable of providing knowing and conscious consent to or refusal of a chemical test is not sufficient to meet his burden of proving his incapability. Ostermeyer v. Department of Transportation, Bureau of Driver Licensing, 703 A.2d 1075 (Pa.Cmwlth. 1997). Expert medical testimony, while not absolute, is generally required to validate a driver's testimony. Id. Based on the trial court's implicit acceptance of Officer Marks's testimony as credible, and the nature of the testimony offered on Reiff's behalf, this Court finds no error in the trial court's determination that his refusal to submit to chemical testing was conscious and knowing.

Reiff also contends that he did not refuse to submit to the test, because he conditionally agreed so long as his sister was present during the blood draw. Officer Robert Johnson, Jr. (Officer Johnson), of the Spring Police Department, testified that when brought to the Berks County DUI Processing Center, Reiff refused to cooperate with the testing. Specifically, Officer Johnson noted that "[Reiff] sa[id] he want[ed] his sister present. But we don't allow personnel to come downstairs. It's a secure location." N.T. at 21; R.R. at 14A.

Anything substantially less than an unqualified, unequivocal assent to take a [chemical] test constitutes a refusal under § 1547. Todd v. Department of Transportation, Bureau of Driver Licensing, 555 Pa. 193, 723 A.2d 655 (1999); Department of Transportation, Bureau of Traffic Safety v. Mumma, 468 A.2d 891, 892 (Pa.Cmwlth. 1983) (citing Department of Transportation, Bureau of Traffic Safety v. Tillitt, 411 A.2d 276 (Pa.Cmwlth. 1980)). As the Department notes,

> there is no mysterious meaning to the word 'refusal.' In the context of the implied consent law, it simply means that an arrestee, after having been requested to take the [chemical] test, declines to do so of his own volition. Whether the declination is accomplished by verbally saying, 'I refuse,' or by remaining silent . . . or by vocalizing some sort of qualified or conditional consent or refusal does not make any difference. The volitional failure to do what is necessary in order that the test can be performed is a refusal.

Rogers v. King, 684 S.W.2d 390, 393-94 (Mo. Ct. App. 1984).

Reiff insisted that his sister be present as condition of his testing. However, no conditions are permitted concurrent with the testing. Assent with conditions equates to a refusal. The trial court correctly concluded that, based on the circumstances and Officer Johnson's credible testimony, Reiff's conduct constituted a refusal to submit to the chemical test.

Accordingly, the order of the trial court is affirmed.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 8th day of February, 2008, the order of the Court of Common Pleas of Berks County in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge