IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eugene Francis Reha	:	
	:	
v.	:	No. 139 C.D. 2009
	:	
Commonwealth of Pennsylvania,	:	Submitted: August 21, 2009
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: October 15, 2009**

In this appeal, the Pennsylvania Department of Transportation, Bureau of Driver Licensing (DOT) asks whether the Court of Common Pleas of Indiana County (trial court) erred in sustaining Eugene Francis Reha's (Licensee) statutory appeal from a one-year disqualification of his commercial driving privileges. Upon review, we affirm.

The Commonwealth charged Licensee with violating 75 Pa. C.S. §3743(a)[1] for leaving the scene of an accident. As a result of this charge, the

[1] 75 Pa. C.S. §3743(a), in relevant part provides:

> The driver of any vehicle involved in an accident resulting only in damage to a vehicle or other property which is driven or attended by any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible but shall forthwith return to and in every event shall remain at the scene of

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Butler County Court of Common Pleas (Butler County Court) accepted Licensee into an ARD program by order dated January 7, 2008 (January 7 Order). DOT informed Licensee that pursuant to 75 Pa. C.S. §1611(a)(3),[2] as a result of his "pre-adjudication, conviction, administrative adjudication, or refusal in Pennsylvania" his commercial driving privileges were disqualified for one year. Certified Record (C.R.) at Ex. A; Reproduced Record (R.R.) at 41a.

On February 1, 2008, Licensee filed a Motion to Vacate Order with the Butler County Court, asserting the January 7 Order did not comport with the agreement reached between Licensee and the Commonwealth. Tr. Ct., Slip Op., 6/17/09, at 2-3; R.R. at 88a-89a. The District Attorney agreed, and the Butler County Court entered an order dated February 12, 2008 (February 12 Order)

(continued…)

> the accident until he has fulfilled the requirements of [75 Pa. C.S. §3744] (relating to duty to give information and render aid).

[2] 75 Pa. C.S. §1611(a)(3), provides in pertinent part:

> (a) **Disqualification for first violation of certain offenses.**-Upon receipt of a report or conviction, [DOT] shall . . . disqualify any person from driving a commercial motor vehicle or school vehicle for a period of one year for the first violation of:
>
> * * * *
>
> (3) section 3743 (relating to accidents involving damage to attended vehicle or property), where the person was a commercial driver at the time the violation occurred ….

overturning and vacating the January 7 Order.[3] C.R. at Ex. B; R.R. at 9a. The February 12 Order provides in relevant part:

> [B]ased on the foregoing Motion, it is hereby [ORDERED], ADJUDGED, and DECREED that the [Licensee's] admission in the ARD Program is overturned and the Order admitting him in the ARD Program dated January 7, 2008 is hereby vacated.

Id. (emphasis added). Subsequent to the February 12 Order, Licensee filed a timely statutory appeal of DOT's disqualification of his commercial driving privileges with the trial court. Tr. Ct., Slip Op., 6/17/07, at 2-3; R.R. at 88a-89a.

Before the trial court, both parties relied on varying interpretations of the term "conviction" as found in 75 Pa. C.S. §1603. The term "conviction" includes:

> [T]he acceptance of [ARD] or other preadjudication disposition for an offense or an unvacated finding of guilt or determination of violation of the law or failure to comply with the law by an authorized administrative tribunal. . . . The term does not include a conviction which has been overturned or for which an individual has been pardoned.

Id. (emphasis added).

[3] In April 2008, the Butler County District Attorney filed a Petition to Discharge Licensee pursuant to Pa. R.Crim.P. 586(2) (relating to court dismissal upon satisfaction or agreement). As such, the Butler County Court entered an order dismissing the charges against Licensee. Tr.Ct., Slip Op., 6/17/09, at 3; R.R. at 89a.

DOT argued the overturned and vacated January 7 Order did not affect the disqualification of Licensee's driving privileges. In Lihota v. Department of Transportation, Bureau of Driver Licensing, 811 A.2d 1117 (Pa. Cmwlth. 2002), this Court held the satisfactory completion of ARD is not necessary and the mere acceptance of ARD constitutes a conviction for the purpose of 75 Pa. C.S. §1603.

Licensee countered that the definition of conviction cannot include the January 7 Order, because that Order was vacated and Licensee's acceptance into an ARD program was overturned. Tr. Ct., Slip Op., 6/17/07, at 5-6; R.R. at 91a-92a. As such, Licensee argued, since his admission into an ARD program was vacated and overturned there was no basis to suspend his driving privileges under 75 Pa. C.S. §1611(a)(3). Tr. Ct., Slip Op., 6/17/07, at 5-6; R.R. at 91a-92a.

Ultimately, the trial court agreed with Licensee. In an opinion in support of sustaining Licensee's appeal, the trial court delineated its analysis into three issues.[4] In its second issue, the trial court determined when a court vacates

[4] In its first issue, the trial court found that although the Butler County Court entered the February 12 Order more than 30 days from the January 7 Order, the Butler County Court properly vacated the January 7 Order. Tr. Ct., Slip Op., 6/17/07, at 8; R.R. at 94a.

Although DOT makes note of this first issue in a parenthetical in the Argument section of its Brief, it did not provide any further analysis and thus did not properly develop this issue for appeal. DOT's Br. at 7, 8; see also Fleeher v. Dep't of Transp., Bureau of Driver Licensing, 850 A.2d 34 (Pa. Cmwlth. 2004) (holding when issues are not properly raised and developed in briefs and the briefs are wholly inadequate to present specific issues for review, a court will not consider the merits).

Moreover, DOT lacks standing to challenge the Butler County Court's February 12 Order vacating its January 7 Order, and cannot collaterally attack the Butler County Court's Order in this appeal. See Glidden v. Dep't of Transp., Bureau of Driver Licensing, 962 A.2d 9 (Pa.

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or nullifies a previous order the "legal status of a case is the same as if the order never existed." Reading City Dev. Auth. v. Lucabaugh, 829 A.2d 744, 749 (Pa. Cmwlth. 2003). Accordingly, the trial court held the February 12 Order vacating the January 7 Order rendered the January 7 Order void, or in other words, as if it never existed. Tr. Ct., Slip Op., 6/17/07, at 9; R.R. at 95a. In its third issue, the trial court found that since the January 7 Order never existed, Licensee was never accepted into an ARD program and thus no conviction existed. Therefore, the trial court held DOT lacked the authority to suspend Licensee's driving privileges pursuant to Section 1611(a)(3) of the Vehicle Code. Tr. Ct., Slip Op., 6/17/07, at 17; R.R. at 9. DOT appealed to this Court.

On appeal,[5] DOT maintains this matter turns on the meaning of the word "conviction." DOT submits a conviction as defined in Section 1603 includes the mere "acceptance" of ARD and not the "completion" or "non-withdrawal" of ARD. DOT asserts that pursuant to Lihota, once a licensee voluntarily accepts ARD, under Section 1603, he is convicted regardless of whether he later changes his mind about accepting ARD. As such, DOT argues Licensee's voluntary acceptance of ARD was a conviction. DOT maintains that pursuant to Section

(continued…)

Cmwlth. 2008) (holding a licensee may not collaterally attack an underlying criminal conviction during a civil license suspension proceeding).

[5] Our scope of review in a license suspension appeal is limited to determining whether the trial court's findings of fact are supported by competent evidence, whether errors of law have been committed or whether the trial court's determination demonstrates a manifest abuse of discretion. Lihota v. Dep't of Transp., Bureau of Driver Licensing, 811 A.2d 1117 (Pa. Cmwlth. 2002).

1611(a)(3), as a result of the conviction, Licensee was subject to disqualification of his commercial driving privileges.

DOT further argues that in Poborski v. Department of Transportation, Bureau of Driver Licensing, 964 A.2d 66 (Pa. Cmwlth.), appeal denied, __ Pa. __, __ A.2d __ (2009), this Court failed to address the requirements imposed upon the States by the Motor Carrier Safety Improvement Act (MCSIA)[6] and its implementing regulations.[7] DOT submits, what happened here is a perfect example of the type of "masking" activity the federal statutes and regulations are intended to prevent with regard to commercial drivers. Therefore, DOT contends the Poborski panel should not have disregarded the MCSIA and thus this Court sitting en banc should overrule Poborski.

In response to DOT's arguments, Licensee argues the January 7 Order, accepting him into an ARD program, is not a conviction. Licensee submits

[6] 49 U.S.C. §§101-521; see also 49 C.F.R. §384.226 (providing "[t]he State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a [commercial] driver's conviction for any violation … of a State or local traffic control law (except a parking violation) from appearing on the [Commercial Driver License Information System] driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.").

[7] In Poborski, the licensee accepted ARD after being charged with DUI. Relying on Lihota, DOT informed the licensee that his commercial driving privileges would be disqualified for one-year. This Court held, however, the facts of Poborski were distinguishable from Lihota. In Lihota, this Court determined that no action was taken by the licensee or by the trial court to nullify the licensee's acceptance of ARD. Thus, in Lihota, the licensee's initial acceptance of ARD remained valid. Conversely, in Poborski, the trial court's subsequent nullification of that acceptance must be read to also nullify DOT's authority to continue any enforcement of its disqualification.

the term conviction does not include overturned convictions, and the January 7 Order accepting him into an ARD program was overturned by the February 12 Order. Licensee also contends in addition to being overturned, the January 7 Order is void because it was vacated. Thus, Licensee contends there is no basis to suspend his driving privileges under Section 1611(a)(3).

Licensee further contends Poborski unequivocally put to rest DOT's argument that his commercial driving privileges should be disqualified. In Poborski, this Court held when a licensee voluntarily removes himself from an ARD program, this voluntary removal nullifies a Section 1603 conviction, and therefore also nullifies the disqualification of a licensee's driving privileges as set forth in Section 1611(a)(3).

Thus, the issue before us is whether Licensee's acceptance into an ARD program and his subsequent voluntary withdrawal from the program constitutes a "conviction" for the purposes of DOT's imposition of a one-year disqualification of his driving privileges under Section 1611(a)(3).

The Court's recent en banc decision in Kolva v. Department of Transportation, Bureau of Driver Licensing, 977 A.2d 1248 (Pa. Cmwlth. 2009), filed after the submission of DOT's brief in the current case, is directly on point and controls the outcome here. In Kolva, the licensee was charged with driving under the influence (DUI) under 75 Pa. C.S. §3802, and accepted ARD for this offense. Shortly thereafter, the licensee learned that his participation in ARD would result in the disqualification of his commercial driving privileges. Through

counsel, he contacted the district attorney to request withdrawal of his acceptance into ARD. The district attorney agreed, and the trial court approved the licensee's withdrawal from ARD. Subsequently, DOT informed the licensee of the one-year disqualification of his commercial driving privileges. After his withdrawal from ARD, the licensee pled guilty to a lesser offense, and the DUI charge was dismissed. This Court, relying on Poborski, held that the licensee's acceptance of ARD was nullified by virtue of his voluntary withdrawal and the trial court's approval of the revocation of ARD.

In the instant matter, it is beyond dispute that DOT's initial disqualification of Licensee's commercial driving privileges was proper because at the time those actions were taken, Licensee accepted ARD. However, similar to Kolva, Licensee nullified his acceptance of ARD through his voluntary withdrawal from an ARD program.

In addition, Licensee's acceptance of ARD was also nullified by the February 12 Order that overturned and vacated the order admitting Licensee into an ARD program. We agree with the trial court that the vacated status of the January 7 Order rendered the Order as if it never existed. Furthermore, the February 12 Order clearly provided that Licensee's admission into an ARD program was overturned and, pursuant to Section 1603, the term conviction does not include convictions that have been overturned. Thus, Licensee's commercial driving privileges cannot be disqualified pursuant to Section 1611(a)(3).

DOT also contends this Court should be cognizant of the federal "anti-masking" provisions of the MCSIA that undoubtedly played a large part in the General Assembly's deliberations when it enacted Chapter 16 of the Vehicle Code. However, as in Kolva, DOT failed to raise its argument regarding the federal anti-masking provisions before the trial court at hearing, in its proposed findings and conclusions, or in its November 2008 letter brief. R.R. at 21a-39a, 67a-68a, 76a-78a. As such, this issue is waived and cannot be raised for the first time on appeal. Pa. R.A.P. 302(a); see also Thoman v. Dep't of Transp., Bureau of Driver Licensing, 965 A.2d 385 (Pa. Cmwlth. 2009) (holding this Court may only review issues on appeal that were presented to the trial court).

Because the trial court did not commit an error of law, this Court must affirm the trial court's order sustaining Licensee's statutory appeal.

ROBERT SIMPSON, Judge

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Appellant	:	

O R D E R

AND NOW, this 15th day of October, 2009, the order of the Court of Common Pleas of Indiana County is **AFFIRMED**.

ROBERT SIMPSON, Judge