IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Enock Gonzalez, II	:
	:
v.	: No. 1632 C.D. 2009
	: Submitted: January 22, 2010
Commonwealth of Pennsylvania,	:
Department of Transportation,	:
Bureau of Driver Licensing,	:
Appellant	:

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: February 16, 2010

The Pennsylvania Department of Transportation, Bureau of Driver Licensing (Department) appeals an order of the Court of Common Pleas of Dauphin County (trial court) sustaining the appeal of Enock Gonzalez, II (Licensee) and rescinding the Department's one-year suspension of his driving privilege for underage drinking because the 18-month delay in proceedings was chargeable to the Department and Licensee met his burden of establishing prejudice due to the delay. Finding no error in the trial court's decision, we affirm.

On October 31, 2007, Licensee was convicted of violating 18 Pa. C.S. §6308 relating to the purchase, consumption, possession or transportation of

alcohol by a minor[1] by a magisterial district judge in Allegheny County. On May 11, 2009, almost 18 months after his conviction, Licensee was notified by the Department that his driving privilege was being suspended for one year as mandated by Section 1532(d) of the Vehicle Code[2] because this was his second conviction for an underage drinking offense.[3] Licensee filed a timely appeal based upon the 18-month delay in imposition of his license suspension.

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[1] Section 6308(a) defines the offense as follows:

> A person commits a summary offense if he, being less than 21 years of age, attempts to purchase, purchases, consumes, possesses, or knowingly and intentionally transports any liquor or malt or brewed beverages, as defined in section 6310.6.

[2] 75 Pa. C.S. §1532(d). Section 1532 (d) provides as follows:

> The department shall suspend the operating privilege of any person upon receiving a certified record of the driver's conviction, adjudication of delinquency or admission into a preadjudication program for a violation under 18 Pa. C.S. §6307 (relating to misrepresentation of age to secure liquor or malt or brewed beverages), 6308 (relating to purchase, consumption, possession or transportation of liquor or malt or brewed beverages) or 6310.3 (relating to carrying a false identification card). The duration of the suspension shall be as follows:
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> …
>
> (2) For a second offense, the department shall impose a suspension for a period of one year.

[3] Licensee's first citation was also for underage drinking in violation of 18 Pa. C.S. §6308. He was cited on July 16, 2005, and on August 8, 2005, he was notified by the Department that his driving privilege was being suspended for 90 days.

Before the trial court, Department's counsel attempted to offer into evidence a copy of the conviction report from the magisterial district judge. The report indicated that the conviction date was October 31, 2007, and contained a handwritten notation stating "Rec'd 5-1-09 MW, No Envelope." Department's counsel claimed the notation proved that it received the report on that date and acted properly and timely when notifying Licensee of his suspension on May 11, 2009. Licensee's counsel objected to the admission of the handwritten notation as hearsay. The trial court continued the hearing until August 4, 2009, to allow the Department the opportunity to produce witnesses to authenticate the document and the date on which it was received.

At the second hearing, the Department called Brenda Collins (Ms. Collins), manager of the Department's Judicial and Information Services Section, as its sole witness. Ms. Collins testified at length as to the Department's processing of conviction reports and what typically happened when a report was received more than six months after the conviction date. However, she ultimately admitted that she did not personally make the notation on the report at issue, that the Department's usual process was not followed in this particular case, and that the Department had no way of knowing how or when the report was actually received in this particular case. Based on her testimony, the trial court sustained Licensee's objection to the handwritten notation as hearsay.

Licensee then testified that he believed that his license might be suspended as a result of his October 2007 conviction, but "after so many months went by, [he] thought it was a dead issue." He admitted that he never contacted the

Department or the magisterial district judge about a possible suspension because so much time had lapsed and he simply "forgot about it." He testified that after being convicted in October of 2007, he moved from Pittsburgh back to Harrisburg, enrolled full-time in the associate's degree program in business management at the Harrisburg Area Community College, and began working full time in his parents' clothing store. Licensee testified that he drove to school and work every day and that he needed his license to ensure that he would be on time to his classes and work. He stated that working at his parents' store enabled them both to work second jobs, and that if he was not able to get back and forth to work, they would have to close their store. Licensee also testified that he renewed his license in March of 2009, well after the conviction.

Based upon this testimony, the trial court sustained Licensee's appeal and rescinded his license suspension. Because the Department could not prove that it first received the conviction report on May 1, 2009, or why the conviction report was allegedly delayed for almost 18 months, the trial court found there was an unreasonable delay chargeable to the Department which led Licensee to believe that his operating privileges would not be impaired. The trial court also found that Licensee met his burden of proving that sufficient prejudice would result if the suspension were imposed after such a delay. The Department then filed this appeal.[4]

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[4] Our scope of review in a license suspension case is limited to determining whether the findings of fact are supported by competent evidence, and whether the trial court committed an error of law or an abuse of discretion. *Department of Transportation, Bureau of Driver Licensing v. Fiore*, 588 A.2d 1332 (Pa. Cmwlth. 1991).

In order to sustain a license suspension appeal based upon delay, the licensee "must prove: (1) an unreasonable delay chargeable to [the Department] led the licensee to believe that his operating privilege would not be impaired; and (2) prejudice would result by having his operating privilege suspended after such delay." *Orloff v. Department of Transportation, Bureau of Driver Licensing*, 912 A.2d 918 (Pa. Cmwlth. 2006). On appeal, the Department concedes that the trial court's finding that it was chargeable for the 18-month delay was supported by competent evidence and does not dispute this issue. Likewise, the Department does not dispute the trial court's finding that Licensee met his burden of proving that he would be prejudiced by the delay were the suspension to go into effect. The sole issue raised on appeal is whether the trial court erred in finding that Licensee's reliance upon the delay was reasonable because Licensee failed to make inquiries as to why his license was not suspended.

According to the Department, Licensee's situation is unique because his operating privilege had already been suspended once before for a similar offense, and he was aware of that suspension and why it was imposed. Therefore, it was unreasonable for him to have done absolutely nothing to determine why he had not received a second notice of suspension, and he cannot rely upon the equitable doctrine of estoppel by laches because he failed to exercise due diligence. The Department relies solely upon our decision in *Nelson v. Department of Transportation, Bureau of Driver Licensing*, 578 A.2d 586 (Pa. Cmwlth. 1990), for the above proposition that Licensee had an affirmative duty to follow up on his second conviction and the status of his driving privilege. However, *Nelson* is

distinguishable from the present case and does not impose such a duty upon Licensee.

In *Nelson*, the licensee refused to submit to a chemical test, and his driving privilege was subsequently suspended for one year. He admittedly received notice of the suspension, which stated that a conviction for driving while his operating privilege was suspended would result in an additional, consecutive period of suspension. His license was suspended for a year during which time licensee was charged with and pled guilty to driving while his operating privilege was suspended. His driving privilege was restored but when the Department notified him of his second license suspension, he appealed. The trial court found that because the licensee knew of and failed to make a reasonable inquiry into the mandatory license suspension, the prejudice he suffered was due to his own inaction rather than any action chargeable to the Department.

There are several key differences between *Nelson* and this appeal. First, the trial court in *Nelson* did not determine that the delay was actually chargeable to the Department, which is the first element necessary in appealing a license suspension due to any delay. Second, the licensee in *Nelson* admitted that he received specific notice that driving while his license was suspended would result in a mandatory second suspension while, in this case, Licensee was not specifically informed that his license would be suspended, although he admitted that he knew that it was a possibility. Third, *Nelson* involved a license suspension for driving while operating privileges were already suspended while this case involves a second conviction for underage drinking which occurred well after

Licensee's operating privileges were restored. Finally, the delay in *Nelson* was only seven months while the delay in this case was 18 months.

Finally, this Court has noted that the principle that the Department must revoke operating privileges within a reasonable time is not based solely upon the equitable doctrine of estoppel by laches; it also rests upon the requirement that the Department act in accordance with the express and implied terms of the Vehicle Code. *Lancos v. Department of Transportation, Bureau of Driver Licensing*, 689 A.2d 342 (Pa. Cmwlth. 1997). Nothing in the Vehicle Code imposes an affirmative duty or due diligence requirement upon a licensee to make sure the Department carries out its statutory duties. As the trial court indicated in its Memorandum Opinion, "It is highly illogical to place the burden of determining whether or not one will be punished for his actions when it is the responsibility of the [Department] to inform the offender. It is not the responsibility of the [licensee] to contact the [Department] in order to ask if the [Department] is doing its job." (October 27, 2009 Memorandum Opinion at 10.)

Accordingly, the order of the trial court is affirmed.

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DAN PELLEGRINI, JUDGE

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O R D E R

AND NOW, this 16th day of February, 2010, the order of the Court of Common Pleas of Dauphin County, dated August 4, 2009, is affirmed.

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DAN PELLEGRINI, JUDGE