IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph W. Nagle	:	
	:	
v.	:	No. 2035 C.D. 2007
	:	Submitted: July 3, 2008
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: August 12, 2008

The Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (DOT), appeals from the October 2, 2007, order of the Court of Common Pleas of Schuylkill County (trial court), which sustained Joseph W. Nagle's (Licensee) appeal from the one-year suspension of his driving privileges and the one-year disqualification from his commercial driving privileges imposed by DOT pursuant to sections 1547 and 1613 of the Vehicle Code (Code).[1] We reverse.

[1] 75 Pa. C.S. §§1547, 1613. Section 1547 of the Code authorizes DOT to suspend the driving privileges of a licensee for one year where the licensee is placed under arrest for driving under the influence, and the licensee refuses a police officer's request to submit to chemical testing. Section 1613 of the Code authorizes DOT to disqualify a licensee from his commercial driving privileges for one year for the refusal to submit to a chemical test.

On April 9, 2007, DOT informed Licensee that, as a result of his refusal to submit to chemical testing on March 10, 2007, his driving privileges were suspended for one year pursuant to section 1547 of the Code and that he was disqualified from his commercial driving privileges pursuant to section 1613 of the Code. Licensee filed a statutory appeal with the trial court, which held a *de novo* hearing on July 31, 2007.

Testifying on behalf of DOT, Pennsylvania State Trooper Edward C. Maddock (Trooper Maddock) stated that, while working radar detail on state route 183, a two-lane, undivided highway, he pulled Licensee over for driving one hundred and three miles per hour in a fifty-five miles per hour zone. Trooper Maddock explained that, when he approached Licensee, he detected a strong odor of alcohol about Licensee's breath and person. Trooper Maddock testified that he asked Licensee to exit his vehicle and he requested that Licensee perform standardized field sobriety tests, including: (1) the one-leg stand test; (2) the walk and turn heel/toe test (heel/toe test); and (3) the horizontal gaze nystagmus (HGN) test. Trooper Maddock further testified that Licensee admitted to having had one beer earlier in the day and that Licensee submitted to a portable or preliminary breath test (PBT), which read .11%.[2] According to Trooper Maddock, Licensee passed the one-leg stand test but failed the other field sobriety tests. Trooper Maddock stated that he placed Licensee under arrest and transported Licensee to a

[2] A PBT administered in the field prior to an arrest, performed on an instrument that detects the presence of alcohol, is not one of the chemical tests of breath, blood or urine deemed to be consented to by section 1547(a) of the Code. *Kromelbein v. Department of Transportation, Bureau of Driver Licensing*, 637 A.2d 728 (Pa. Cmwlth.), *appeal denied*, 539 Pa. 639, 650 A.2d 53 (1994). The PBT is just another form of field sobriety test used by police officers when deciding whether a driving while intoxicated arrest should be made. *Id.*

local hospital for chemical testing, where he read Licensee the Pennsylvania Implied Consent DL-26 Form (DL-26 Form)[3] and O'Connell warnings.[4] According to Trooper Maddock, Licensee refused to submit to any chemical testing. (R.R. at 31a-36a.) On cross-examination, Trooper Maddock agreed that of the eighteen steps required in the heel/toe test, Licensee missed two heel/toe touches and did not stagger or fall over during the test. (R.R. at 37a-41a.)

Licensee also testified at the hearing, stating that he and his daughter had been out for a drive and were on their way home when Trooper Maddock pulled him over for speeding. Licensee stated that, when questioned by Trooper Maddock about the smell of alcohol on his person, he admitted that he had had a couple of beers. Regarding the various field sobriety tests, Licensee testified that, after the heel/toe test, Trooper Maddock only advised him that he turned too quickly, not that he missed any heel/toe touches; in addition, Trooper Maddock told Licensee that he turned his head during the HGN test but never told Licensee the results of the PBT. Licensee stated that Trooper Maddock then transported him to a local hospital, requested that he submit to a blood test and informed Licensee that if he refused, his driving privileges would be suspended for a year. Licensee testified that Trooper Maddock neither showed him the DL-26 Form nor asked him

[3] We have held that the verbiage on the DL-26 Form adequately informs a licensee of the consequences for refusing to submit to an officer's request for a chemical test. *Weaver v. Department of Transportation, Bureau of Driver Licensing*, 873 A.2d 1 (Pa. Cmwlth. 2005), *aff'd*, 590 Pa. 188, 912 A.2d 259 (2006).

[4] *Department of Transportation, Bureau of Traffic Safety v. O'Connell*, 521 Pa. 242, 555 A.2d 873 (1989). O'Connell warnings require that police officers inform individuals that there is no right to counsel when deciding whether to submit to chemical testing. *Id.*

to sign it.[5] Licensee stated that when he asked to call his lawyer, Trooper Maddock informed him that he was not allowed to do so. Licensee explained that he refused to take the blood test because he was not drunk and because he could not call his lawyer. (R.R. at 43a-48a.)

Based on this evidence, the trial court concluded that, because Licensee passed the first field sobriety test, Trooper Maddock did not have reasonable grounds to believe that Licensee was operating his vehicle while under the influence of alcohol and, thus, had no cause to place Licensee under arrest for DUI. Accordingly, the trial court sustained Licensee's appeal.[6] DOT now appeals to this court.[7]

DOT argues that the trial court erred in restoring Licensee's operating privileges based on its determination that Trooper Maddock lacked reasonable grounds to believe that Licensee was driving under the influence of alcohol.[8] DOT

[5] To the extent that Licensee suggests in his testimony and in his brief to this court that the warnings he received were insufficient, (Licensee's brief at 4-5), this issue is waived because, in his appeal to the trial court, Licensee did not challenge the sufficiency of the warning given to him by Trooper Maddock. (R.R. at 8a-9a.) Pa. R.A.P. 302 (stating that issues not raised before the trial court are waived).

[6] The trial court did not submit an opinion supporting its order.

[7] Our scope of review in a license suspension case is limited to determining whether the trial court's findings of fact are supported by substantial evidence, whether errors of law have been committed or whether the trial court abused its discretion. *Cole v. Department of Transportation, Bureau of Driver Licensing*, 909 A.2d 900 (Pa. Cmwlth. 2006), *appeal denied*, 591 Pa. 717, 919 A.2d 959 (2007).

[8] In order to sustain a suspension or disqualification of operating privileges under sections 1547 and 1613 of the Code, DOT must establish that: (1) the licensee was arrested for

(Footnote continued on next page…)

asserts that the fact that Licensee passed one of the four field sobriety tests he was given did not prevent Trooper Maddock from properly forming his belief based on all of the facts surrounding Licensee's traffic stop, and the fact that Licensee passed one out of four field sobriety tests did not render that belief unreasonable. We agree.

The test for determining whether a police officer possesses reasonable grounds to suspect that an individual is driving under the influence is not demanding. *Cole v. Department of Transportation, Bureau of Driver Licensing*, 909 A.2d 900 (Pa. Cmwlth. 2006), *appeal denied*, 591 Pa. 717, 919 A.2d 959 (2007). Reasonable grounds for suspicion that a driver is operating his vehicle under the influence exist when a person in the position of the police officer, viewing the facts and circumstances as they appeared at the time, could have concluded that the motorist was operating the vehicle while under the influence of alcohol. *Banner v. Department of Transportation, Bureau of Driver Licensing*, 558 Pa. 439, 737 A.2d 1203 (1999). Whether the police officer has reasonable

(continued…)

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 or a controlled substance in violation of section 3802 of the Code, 75 Pa. C.S. §3802; (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. Department of Transportation*, 903 A.2d 636 (Pa. Cmwlth. 2006). It is undisputed that Trooper Maddock warned Licensee that his refusal would result in a license suspension for one year and that Licensee refused to submit to a chemical test. (R.R. at 47a, 50a-51a.) Thus, the sole question before this court is whether Trooper Maddock had reasonable grounds to believe that Licensee was driving under the influence of alcohol when Trooper Maddock placed Licensee under arrest.

grounds to believe that the individual is violating the DUI provisions is a question of law subject to appellate review.[9] *Id*.

A licensee's relative success in performing field sobriety tests is just **one** factor to be taken into account when determining the existence of reasonable grounds. *Kuzneski v. Commonwealth*, 511 A.2d 951 (Pa. Cmwlth. 1986), *appeal denied*, 514 Pa. 620, 521 A.2d 934 (1987). The fact that a motorist passes a field sobriety test does not negate the existence of reasonable grounds where the **totality of the circumstances** supports such a conclusion. *Craze v. Department of Transportation*, 533 A.2d 519 (Pa. Cmwlth. 1987), *appeal denied*, 518 Pa. 644, 542 A.2d 1372 (1988); *see also Cole* (stating that a police officer is not required to perform **any** field sobriety tests in order to form a reasonable belief that an individual is driving under the influence of alcohol or a controlled substance). Consequently, the trial court erred in basing its holding on the result of a **single** field sobriety test rather than considering all of the circumstances surrounding Licensee's traffic stop and arrest.

Here, Trooper Maddock testified that he detected a strong odor of alcohol on Licensee's person and clothing when he approached Licensee and that Licensee "blew" a .11% on the PBT. For his part, Licensee acknowledged that he failed the heel/toe test and the HGN test,[10] and he admitted that he told Trooper

[9] The standard of reasonable grounds does not rise to the level of probable cause required for a criminal prosecution. *Banner*.

[10] Citing *Commonwealth v. Stringer*, 678 A.2d 1200 (Pa. Super.), *appeal denied*, 546 Pa. 679, 686 A.2d 1310 (1996); *Commonwealth v. Moore*, 635 A.2d 625 (Pa. Super. 1993), *appeal denied*, 540 Pa. 612, 656 A.2d 118 (1995); *Commonwealth v. Apollo*, 603 A.2d 1023 (Pa. **(Footnote continued on next page…)**

Maddock that he had had a couple of beers. Notwithstanding Licensee's ability to pass the one-leg stand test, a person in Trooper Maddock's position certainly could have concluded from the totality of these circumstances that Licensee had been operating his vehicle while under the influence of alcohol, providing reasonable grounds to place Licensee under arrest for DUI.

Accordingly, we reverse.

ROCHELLE S. FRIEDMAN, Judge

(continued…)

Super.), *appeal denied*, 531 Pa. 650, 613 A.2d 556 (1992), Licensee asserts that all HGN results are illegal and inadmissible in Pennsylvania courts and, thus, should not be considered in license suspension cases. However, these cases involve DUI criminal prosecutions, not civil license suspensions and, therefore, implicate a higher burden of proof for the Commonwealth, i.e., probable cause. Moreover, those opinions do not state that **all** HGN results are illegal or inadmissible; rather, they hold that, for HGN results to be admissible, the Commonwealth is required to provide an adequate foundation that the test has gained general acceptance in the scientific community.

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O R D E R

AND NOW, this 12th day of August, 2008, the order of the Court of Common Pleas of Schuylkill County, dated October 2, 2007, is hereby reversed.

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ROCHELLE S. FRIEDMAN, Judge