IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Theresa A. Kamus-Kelly, Appellant	:	
v.	:	No. 2154 C.D. 2008
	:	Submitted: July 17, 2009
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANUM OPINION
BY JUDGE LEAVITT FILED: August 20, 2009

Theresa Kamus-Kelly (Licensee) appeals an order of the Luzerne County Court of Common Pleas (trial court), dismissing her statutory appeal and reinstating a six-month suspension of her operating privilege imposed by the Department of Transportation, Bureau of Driver Licensing (Department), pursuant to Section 1532(c) of the Vehicle Code, 75 Pa. C.S. §1532(c).[1] The suspension resulted from Licensee's conviction for violating Section 13(a)(12) of The

[1] Section 1532(c) provides, in pertinent part:

> The Department shall suspend the operating privilege of any person upon receiving a certified record of the *person's conviction of any offense involving the possession*, sale, delivery, offering of sale, holding for sale or giving away *of any controlled substance*.

75 Pa. C.S. §1532(c) (emphasis added).

Controlled Substance, Drug, Device and Cosmetic Act (Act).[2] In this appeal, Licensee asserts that her conviction was for "acquisition" of a controlled substance rather than "possession" and that acquisition is not grounds for suspension under Section 1532(c). Concluding that Licensee's contentions lack merit, we affirm the trial court.

Licensee, a surgical nurse, recited on a patient record that she had disposed of a quantity of fentanyl, a Schedule II controlled substance under the Act, in accordance with hospital procedures. Instead, the drug was found in her work locker. On October 27, 2005, Licensee pled guilty to violating Section 13(a)(12) of the Act. The conviction report was sent to the Department, and on November 28, 2005, the Department suspended Licensee's driver's license for six months under Section 1532(c) of the Vehicle Code. Licensee appealed the suspension order.

Before the trial court, Licensee argued that she was not convicted of a possessory offense, pointing to the disjunctive language used by the General Assembly, *i.e.*, "acquisition *or* obtaining of possession." Section 13(a)(12) of the Act, 35 P.S. §780-113(a)(12). Licensee contended that because the General Assembly used "or," it must have intended that each portion of the phrase have a different meaning. She further argued that she was permitted to possess the drug as a medical professional and that she merely acquired the drug as a result of a "paperwork mishap." Licensee's Brief at 8. Finally, Section 1532(c) mandates suspension where the licensee has been convicted "of any offense involving the

[2] Act of April 14, 1972, P.L. 233, *as amended*, 35 P.S. §780-113(a)(12). Section 13(a)(12) of the Act prohibits the "acquisition or obtaining of possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge."

possession … of any controlled substance." 75 Pa.C.S. §1532(c). It does not specifically enumerate offenses involving acquisition of a controlled substance. Accordingly, the Department lacked authority under Section 1532(c) to suspend her license. Alternatively, Licensee contended that the General Assembly did not intend for Section 1532(c) to apply to medical professionals who commit administrative errors; rather, the statute is intended to deter the illegal drug trade.

Finally, Licensee alleged that she was being treated disparately from physicians and pharmacists, who she claimed did not have their licenses suspended.[3] However, Licensee did not offer testimony or any evidence to bolster these bare allegations.

Regarding Licensee's argument based upon the disjunctive language in Section 13(a)(12) of the Act, the Department countered that after Licensee acquired the drug, she had illegal possession of the drug. Further, the Department noted that Licensee failed to present any evidence that she was convicted solely for acquisition of a controlled substance, as opposed to possession of a controlled substance. The Department argued that there is no distinction between the acquisition of a controlled substance and the possession of a controlled substance, relying on *Keim v. Department of Transportation, Bureau of Driver Licensing*, 887 A.2d 834 (Pa. Cmwlth. 2005), and *Conchado v. Department of Transportation,*

[3] Licensee based this argument on *dicta* in the trial court's opinion in *Urciuolo v. PennDOT*, 35 Pa. D. & C.4th 390, 397 (Dauphin Co. 1996). In that case, the trial court stated that it had difficulty comprehending the remedial benefit of suspending a medical professional's driver's license for forging a prescription, particularly because the Department does not suspend a license if a medical professional violates certain other subsections which prohibit the sale or dispensing of controlled substances by doctors or pharmacists except as authorized by law. Licensee failed to recognize that the *Urciuolo* court affirmed the licensee's suspension, albeit reluctantly, because it found no basis in the law to not uphold the suspension. Further, the *Urciuolo* opinion was merely persuasive and not binding precedent on the trial court in this case.

Bureau of Driver Licensing, 941 A.2d 792 (Pa. Cmwlth. 2008).[4] The Department argued, further, that nothing in the statute indicated that it only applied to the sale of illegal drugs. Rather, the Department claimed that any conviction under Section 13(a)(12) of the Act was sufficient to impose a suspension because all of the offenses encompassed by the section involve possession.

Finally, the Department contended that Licensee's constitutional arguments lacked merit. It asserted that the Department treats all licensees convicted under the statute the same, regardless of their profession.

The trial court rejected Licensee's arguments and denied her appeal. The present appeal followed.

On appeal,[5] Licensee argues that Section 1532(c) of the Vehicle Code does not apply to her conviction for violating Section 13(a)(12) of the Act because she was not convicted of a possessory offense. Licensee contends that the disjunctive wording of Section 13(a)(12) indicates that the General Assembly did not intend to apply the statute to medical professionals in her circumstances. Moreover, Licensee argues that the suspension of her license violates her rights of equal protection, due process and fundamental fairness.[6]

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[4] In *Keim*, this Court held that "a conviction for manufacture of a controlled substance is a conviction of an 'offense involving possession' of a controlled substance" because "a person may not manufacture a controlled substance without possessing it." 887 A.2d at 839. In *Conchado*, this Court further clarified its holding in *Keim* by establishing that the phrase "any offense involving" in Section 1532(c) "should be broadly interpreted to include convictions not specifically enumerated." 941 A.2d at 795.

[5] This Court's scope of review is limited 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. *Finnegan v. Department of Transportation, Bureau of Driver Licensing*, 844 A.2d 645, 647 n.3 (Pa. Cmwlth. 2004).

[6] Because Licensee's constitutional arguments are not fairly included in or even suggested by the single question that she presented on appeal, she waived these issues. *See* PA. R.A.P. 2116(a)

(Footnote continued on the next page . . .)

Upon review of the record and the trial court's opinion, we conclude that the trial court thoroughly, ably, and correctly disposed of the issues raised by Licensee. Accordingly, we affirm on the basis of the opinion filed by the Honorable Michael T. Toole in this matter at *Kamus-Kelly v. Department of Transportation, Bureau of Driver Licensing*, No. 14627 of 2005 (Court of Common Pleas of Luzerne County, filed October 7, 2008).

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MARY HANNAH LEAVITT, Judge

(continued . . .)

("No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby."); *Schultz v. Department of Transportation*, 488 A.2d 408, 409 (Pa. Cmwlth. 1985). Moreover, even if Licensee had properly appealed these issues, the trial court fully analyzed her claims and correctly held that she presented "nothing in either the facts or the law to support her arguments." Trial Court Opinion at 5.

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O R D E R

AND NOW, this 20th day of August, 2009, the order of the Court of Common Pleas of Luzerne County dated October 7, 2008, in the above-captioned matter is hereby AFFIRMED on the basis of its opinion at *Kamus-Kelly v. Department of Transportation, Bureau of Driver Licensing*, No. 14627 of 2005 (Court of Common Pleas of Luzerne County, filed October 7, 2008).

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MARY HANNAH LEAVITT, Judge