

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Eden,	:	
	:	
Appellant	:	
	:	
v.	:	No. 2174 C.D. 2007
	:	
Commonwealth of Pennsylvania,	:	Submitted: March 20, 2008
Department of Transportation,	:	
Bureau of Driver Licensing	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: May 13, 2008

John Eden (Licensee) appeals an order of the Court of Common Pleas of Monroe County (trial court) that denied his statutory appeal of the Department of Transportation’s (PennDOT) suspension of his driver’s license. PennDOT suspended Licensee’s driving privilege for 18 months¹ under 75 Pa. C.S. §1547(b)(1) (Implied Consent Law) as a consequence of his refusal to submit to chemical testing. Licensee argues the trial court erred in determining he made a knowing and conscious refusal to submit to a chemical blood test. Discerning no merit in this assertion, we affirm.

¹ PennDOT previously suspended Licensee’s driving privilege for one year based on a prior conviction for driving while intoxicated (DWI) in the State of New Jersey. Supplemental Reproduced Record at 6b-8b. Because of this prior DWI conviction, Licensee’s current suspension is 18 months rather than 12 months. See 75 Pa. C.S. §1547(b)(1)(ii)(B)(III).

PennDOT notified Licensee of an 18-month suspension of his operating privileges based on his refusal to submit to chemical testing in connection with his arrest for a violation of 75 Pa. C.S. §3802 (driving under the influence of alcohol (DUI)). Licensee filed a statutory appeal with the trial court.

At a de novo hearing before the trial court, PennDOT presented the testimony of Pocono Mountain Regional Police Officer Jeffrey Papi (Officer Papi). Officer Papi testified while on routine patrol he proceeded to the scene of an automobile accident. Upon arrival, he observed a vehicle in a ditch on the side of the road and Licensee standing in the road with blood running down his face. Officer Papi testified he spoke with Licensee, and Licensee confirmed he was the driver of the vehicle involved in the accident. Officer Papi testified Licensee was “verbally combative,” and had an unsteady gait and bloodshot eyes. Reproduced Record (R.R.) at 14a. He placed Licensee under arrest for public drunkenness, disorderly conduct and DUI.

Officer Papi testified he “read [Licensee] the consent form to give blood down at the hospital. I read it word for word to him, explained ... everything that was in the form. [Licensee] refused to give blood at the time.” R.R. at 15a. Officer Papi identified PennDOT’s implied consent form DL-26 as “the copy of the document that was read to [Licensee] at the scene.” R.R. at 16a. He reiterated he read Licensee the implied consent form verbatim, but Licensee refused chemical testing.

Nevertheless, Officer Papi testified he and another officer transported Licensee to Pocono Medical Center. He explained:

We brought him down to the hospital to see if he wanted to give blood again and get further medical treatment We brought him into the lobby of the hospital. We read him the chemical form again ... and he agreed to give blood at that time. ...

We were in the hospital and the security guard that was working began to ask [Licensee] questions, basic information, social security number, which we did not have at that time, basic information they needed to complete the blood form. [Licensee] became verbally combative and would not give the necessary information for the chemical testing. I then advised him that if he doesn't cooperate with the staff here, this would be deemed a refusal, and [Licensee] stated that he did not want to give blood.

Q. [PennDOT's Counsel]: [Licensee], after having said that, he verbally told you that he changed his mind and now he would not?

A. [Officer Papi]: Yes.

Q. [PennDOT's Counsel]: It was th[en] that you deemed his actions and failing to give information to the persons at Pocono Medical Center, a refusal, it was his statement?

A. [Officer Papi]: Yes.

R.R. at 17a-18a.

In response, Licensee testified that after his arrest for DUI, Officer Papi read him the implied consent warnings. Licensee testified he expressed a willingness to submit to a blood test to Officer Papi, but he did not wish to waive

his right to counsel. He also testified he agreed to a blood test at the hospital, but did not understand why he was asked to provide his social security number.

The trial court subsequently issued an opinion in which it credited Officer Papi's testimony that he read Licensee the implied consent warnings at the accident scene and at the hospital, and Licensee refused to submit to chemical testing on both occasions. The trial court also specifically rejected Licensee's argument that he did not refuse the chemical blood test, but merely refused to give his social security number to hospital personnel. Ultimately, the trial court determined PennDOT met its burden of proof to sustain Licensee's suspension. Licensee appealed to this Court.²

Initially, we note, to sustain a license suspension under the Implied Consent Law, PennDOT must establish a licensee: was arrested for DUI; was asked to submit to a chemical test; refused to do so; and, was specifically warned a refusal would result in a suspension of his driver's license. Whistler v. Dep't of Transp., Bureau of Driver Licensing, 882 A.2d 537 (Pa. Cmwlth. 2005). Once PennDOT meets its burden, the licensee has the obligation to establish that his refusal was not knowing or that he was physically unable to take the test. Id.

Questions of credibility and the reconciliation of conflicting testimony are within the domain of the trial court. Hudson v. Dep't of Transp., Bureau of

² Our review is limited to determining whether findings of fact were supported by substantial evidence, whether an error of law was committed or whether the trial court abused its discretion. Cole v. Dep't of Transp., Bureau of Driver Licensing, 909 A.2d 900 (Pa. Cmwlth. 2006), appeal denied, 591 Pa. 717, 919 A.2d 959 (2007).

Driver Licensing, 830 A.2d 594 (Pa. Cmwlth. 2003). If sufficient evidence exists to support the trial court's findings, we must pay it proper deference and affirm. Id.

Licensee argues the trial court erred in determining he knowingly refused to submit to a chemical blood test. He asserts the trial court erred in rejecting his argument that the only reason he refused chemical testing was because a hospital staff member asked him for his social security number. Licensee argues this case is analogous to cases that hold, where a licensee's submission to a chemical test is conditioned on the licensee signing a hospital consent form or a waiver of liability form, a licensee's failure to take a chemical test is not deemed a refusal. See, e.g., Petrocsko v. Dep't of Transp., Bureau of Driver Licensing, 745 A.2d 714 (Pa. Cmwlth. 2000); Burke v. Dep't of Transp., Bureau of Driver Licensing, 733 A.2d 13 (Pa. Cmwlth. 1999), appeal dismissed as improvidently granted, 564 Pa. 304, 768 A.2d 299 (2001).

The issue of whether a motorist's conduct constitutes a refusal to submit to chemical testing is a question of law to be determined based on the facts found by the trial court. Broadbelt v. Commonwealth, Dep't of Transp., 903 A.2d 636 (Pa. Cmwlth. 2006). It is clear that anything less than an unqualified, unequivocal assent constitutes a refusal under the Implied Consent Law. Id. Further, a motorist's refusal to submit need not be expressed in words; rather, a motorist's conduct may demonstrate a refusal to submit to chemical testing. Id.

Here, the trial court made the following pertinent findings:

5. [Officer Papi] read [Licensee] the Commonwealth Form DL-26 “word for word”.

6. [Licensee] refused to submit to the chemical testing.

7. The Police then transported [Licensee] to Pocono Medical Center and at Pocono Medical Center, [Licensee] was once again asked to submit to chemical testing. After first agreeing to submit to the test, he changed his mind and refused.

Tr. Ct., Slip Op., 10/26/07, Findings of Fact (F.F.) Nos. 5-7. These findings are directly supported by the credible testimony of Officer Papi. R.R. at 15a-17a, 21a.

In rejecting Licensee’s argument that he did not refuse to submit to the blood test, but only refused to provide his social security number to hospital personnel, the trial court stated:

As to [Licensee’s argument] that he did not refuse the test but merely refused to give his social security number to hospital personnel, we find his testimony not credible and the testimony of Officer [Papi] credible. [Officer Papi] testified that he gave [Licensee] a chance to once again take the test after arriving at the hospital, and [Licensee] refused.

Tr. Ct., Slip Op. at 5 (emphasis added).

Contrary to Licensee’s assertions, Officer Papi did not deem it a refusal because Licensee refused to give his social security number to hospital personnel. In attempting to establish this fact, the following exchange occurred during Licensee’s counsel’s cross-examination of Officer Papi:

Q. [Licensee's Counsel]: [Licensee] refused to give [hospital personnel] [his] social security number, is that right?

A. [Officer Papi]: Yes.

Q. And then that's when you told him if he didn't give it to him, it would be considered a refusal?

A. Well, among other things, in terms of cooperating with the staff and everything else, but I told him he needs to answer the basic questions he was requesting to go along with the test.

Q. You told him if he didn't, you were going to consider it a refusal?

A. Right.

Q. And he would not give the social security number?

A. Right

R.R. at 20a.

However, on redirect examination, Officer Papi clarified:

Q. [PennDOT's Counsel]: Was it [Licensee's] refusal to give the information or his statement that he was not going to take the blood test that you deemed a refusal for chemical testing?

A. [Officer Papi]: The statement that he advised me that he did not want to go through with the blood.

R.R. at 21a (emphasis added). Although Licensee testified he did not refuse a blood test, the trial court expressly rejected his testimony as not credible. Tr. Ct., Slip Op. at 5. We cannot disturb this credibility determination on appeal. Hudson.

Moreover, contrary to Licensee's assertions, this is not a case like Petrocsko or Burke, in which we held that where a licensee's submission to a chemical test is conditioned on the licensee signing a hospital form, the licensee's failure to take and complete a chemical test is not considered a refusal.

In Burke, this Court explained:

Here, there is no question that [the] [I]licensee initially consented to take a subsequent blood test. He willingly went to the hospital and signed [Penn]DOT's form consenting to the test and indicating that he understood the warnings the officers had given him. However, the hospital did not conduct the blood test because [the] [I]licensee refused to sign a hospital form. We agree with the trial court that [the] [I]licensee's refusal to sign the hospital form did not constitute a refusal of the test, i.e., a revocation of his consent to take that test.

Requiring a licensee to sign a form, of whatever nature, in order to consent to chemical testing, is beyond the parameters [of the Implied Consent Law] which does not require a licensee to complete any pre-test procedure. Thus, a licensee's failure to sign a hospital form is not a *per se* refusal to chemical testing. On the other hand, failure to sign a hospital form will constitute a refusal where the licensee has not given an unqualified, unequivocal assent to the test itself. ...

Although [the] [I]licensee refused to sign, or even look at, the hospital form, his refusal related solely to the form; he gave an unqualified, unequivocal assent to the test itself. Indeed, prior to the time the hospital staff told [the] [I]licensee that he had to sign the form, [the] [I]licensee had unqualifiedly and unequivocally agreed to submit to the blood test. Even after he refused to sign the form, [the] [I]licensee restated his agreement to submit to the test. ... We therefore conclude that [the] [I]licensee

did not refuse the blood test when he refused to sign the hospital form.

Burke, 733 A.2d at 16-17 (citations, quotations and footnote omitted). See also Petrocsko (where a licensee consents to undergo chemical testing but refuses to sign a form, the refusal to sign the form does not constitute a refusal to submit to chemical testing).

Here, unlike in Burke or Petrocsko, Officer Papi did not impose any pre-condition on Licensee's submission to the blood test. In addition, based on the trial court's resolution of issues of credibility and evidentiary weight, it is clear that Licensee's conduct constituted a refusal to submit to the blood test.

More specifically, it is apparent from Officer Papi's credited testimony that Licensee refused to submit to chemical blood testing despite two opportunities to do so. Officer Papi explained Licensee "was verbally combative" and "uncooperative with [the] investigation" at the scene of the accident; in fact, Licensee was quickly placed under arrest for public drunkenness and disorderly conduct. R.R. at 14a. After Officer Papi read Licensee the implied consent warnings at the accident scene, Licensee refused to submit to a blood test. R.R. at 15a. Later, at the hospital, after being read the implied consent warnings a second time, Licensee again "became verbally combative" and would not cooperate with hospital staff. R.R. at 17a. Officer Papi testified Licensee again stated "he did not want to give blood." Id. As such, we discern no error in the trial court's determination that Licensee refused to submit to chemical blood testing as required by the Implied Consent Law.

Additional support for our conclusion is found in Commonwealth, Department of Transportation v. Renwick, 543 Pa. 122, 669 A.2d 934 (1996). Like here, the facts in Renwick included the licensee's general lack of cooperation with police officers with regard to submitting to a blood test at the hospital. There, the officer read the licensee implied consent warnings twice and asked her to sign the DL-26 Form on two separate occasions. The licensee ignored the officer and turned her head. When the officer again asked the licensee if she would consent to the blood test, she did not respond. When the officer informed the licensee her silence would be considered a refusal resulting in suspension of her license, she stated she would submit to the test. When the officer handed the licensee the consent form, she refused to sign it. Ultimately, our Supreme Court held:

We continue to adhere to the established law providing that anything less than an unqualified, unequivocal assent constitutes a refusal under [the Implied Consent Law]. Although [the licensee's] refusal to sign the consent form does not, in and of itself, constitute a refusal to take the chemical test, the facts dictate that [the licensee's] overall conduct demonstrated a refusal.

[The licensee] was requested to submit to the chemical testing several times by two separate officers. [The licensee] responded by closing her eyes, turning her head and ignoring their requests. In a fleeting moment, [the licensee] then stated that she would assent to the test. Such gamesmanship is not to be countenanced by the jurisprudence of this Commonwealth and does not promote the interests underlying the Implied Consent Law.

Id. at 131, 669 A.2d at 939 (citations and footnote omitted). The Court determined the facts dictated the licensee's overall conduct constituted a refusal.

As in Renwick, Licensee's overall lack of cooperation here constituted a refusal. Licensee rejected an initial request to submit to a blood test at the accident scene. Further, after initially agreeing to a second request at the hospital, Licensee ultimately refused a blood test. Under these circumstances, we agree with the trial court that Licensee's overall conduct constituted a refusal.³

Accordingly, we affirm.

ROBERT SIMPSON, Judge

³ Citing Lutz v. Department of Transportation, Bureau of Driver Licensing, 734 A.2d 478 (Pa. Cmwlth. 1999), Licensee also argues, although he initially refused a blood test, Officer Papi gave him a second chance to submit to a blood test at the hospital, and, as a result, Officer Papi waived the initial refusal at the accident scene. We disagree. In Lutz, the licensee attempted to use a breathalyzer but was unable to provide the requisite breath samples. Without registering this as a refusal, the administering officers offered to take the licensee to a hospital for a blood test, and the licensee agreed. We noted that while the inability to provide the requisite breath samples typically is "deemed a refusal as a matter of law," the licensee's subsequent assent to a blood chemical test rendered the prior refusal a nullity. Id. at 481.

Here, unlike in Lutz, Licensee did not cooperate with Officer Papi. When requested to submit to a blood test at the accident scene, Licensee became verbally combative, and, as a result, his conduct was deemed a refusal at that time. R.R. at 15a. In addition, although at the hospital Licensee initially agreed to submit to a blood test, he ultimately refused to do so. R.R. at 17a-18a, 21a. These facts are sufficient to distinguish this case from Lutz. Cf. Olbrish v. Dep't of Transp., Bureau of Driver Licensing, 619 A.2d 397 (Pa. Cmwlth. 1992) (police officer's gratuitous offer to permit licensee to submit to blood test does not constitute waiver of licensee's initial refusal to submit to breathalyzer test).

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Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing	:	

ORDER

AND NOW, this 13th day of May, 2008, the order of the Court of Common Pleas of Monroe County is **AFFIRMED**.

ROBERT SIMPSON, Judge