

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alesya Starayeva :
 :
 v. :
 :
 Commonwealth of Pennsylvania, :
 Department of Transportation, :
 Bureau of Driver Licensing, : No. 2622 C.D. 2010
 Appellant : Submitted: July 8, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION¹
 BY JUDGE McGINLEY

FILED: October 24, 2011

The Department of Transportation, Bureau of Driver Licensing (DOT) appeals the order of the Court of Common Pleas of Montgomery County (trial court) which sustained the appeal of Alesya Starayeva (Starayeva) from a one year suspension of her operating privilege pursuant to Section 1547(b)(1) of the Vehicle Code (Code), 75 Pa.C.S. §1547(b)(1).²

¹ This case was reassigned to the author on August 8, 2011.

² Section 1547(b)(1) of the Code provides:

(b) Suspension for refusal.—

(1) If any person placed under arrest for a violation of section 3802 [relating to driving under influence of alcohol or controlled substance] is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person . . . (i) . . . for a period of 12 months.

By official notice dated June 15, 2010, DOT informed Starayeva that her operating privilege was suspended for one year, effective July 20, 2010, as a result of her refusal to submit to chemical testing on April 18, 2010. Starayeva appealed the suspension to the trial court.

At a *de novo* hearing, Officer Christopher Swoyer (Officer Swoyer) of the Borough of Hatboro Police Department testified that at approximately 3:01 a.m. on April 18, 2010, while on patrol, he observed a silver colored Honda traveling southbound on North York Road in Hatboro. Notes of Testimony, November 8, 2010, (N.T.) at 5; Reproduced Record (R.R.) at 19a. Officer Swoyer made the following observations:

The Honda came to a stop behind another vehicle at a red light at the intersection at York Road and Montgomery Avenue.

The traffic light remained red, and then I observed the Honda essentially move to a position to the right of the lead vehicle that was stopped at the red light and proceed through the red light.

I followed the Honda south on York Road and effected a vehicle stop in front of 21 South York Road. I approached the Honda's operator and identified her [Starayeva].

.....

... I exited my vehicle and approached the operator. I was immediately aware that she was hearing impaired. She advised me of that.

I had asked for her driver's license initially, and after realizing she was hearing impaired, I wrote on my patrol pad asking for her driver's license. I also advised her why she was stopped, that she ran a red light.

.....

. . . She replied that she did not run the red light, that she was just rushing home. She did provide me her driver's license.

During the field contact, I observed that her eyes were slightly bloodshot and she had a moderate odor of intoxicating beverages on her breath.

N.T. at 5-6; R.R. at 19a-20a.

Officer Swoyer administered a portable breath test to Starayeva. The result of the test indicated a preliminary blood alcohol concentration of .20 percent. Officer Swoyer administered three field sobriety tests to Starayeva. She failed all three. Officer Swoyer then placed Starayeva under arrest and transported her to the processing room at the police station. N.T. at 6-7; R.R. at 20a-21a. Officer Swoyer communicated with Starayeva by writing on his pad and then showing the pad to her.

Under questioning from DOT's attorney, Joanne Steinke Faul (Attorney Faul), Officer Swoyer explained what occurred in the processing room:

Q: Officer, with the aid of these documents, can you explain to the Court what transpired in the station when you asked for the breath test?

A: Yes. I asked her if she was willing to submit to one and that she was under arrest for DUI. . . .

Q: And if you can, officer, can you indicate how you did each of these requests, since we are dealing with someone who is hearing impaired, and clearly some of these things are written down.

You indicated you wrote these requests down and said them orally?

A: Yes. That request was written down, both those advisements.

Q: And her response to that was?

A: Her initial response was she nodded in the affirmative. After making that initial request, we're required by statute to wait a minimum of 20 minutes before administering an evidentiary breath test to DUI defendants.

During that 20-minute downtime, some things transpired with respect to Ms. Starayeva's willingness to listen to what I was trying to tell her. She presented to me . . . a business card for an individual. She requested that I contact this individual for assistance.

I advised Ms. Starayeva that I would not be calling anyone for assistance, that she was under arrest for DUI, and that nobody was going to be coming to the police station. It's standard for us not to permit contact with defendants with outside individuals.

....

[DOT submitted exhibits of Officer Swoyer's writings to Starayeva]

The Court: Okay. Why did you write that [are you willing to submit to a breath test, you are under arrest for DUI]? If you had already told her orally, and she had nodded her head, why was this written?

A: Just to establish clear communication. I wanted to be sure that she understood. I wasn't comfortable with just speaking. I didn't know if she read lips or how well she could understand me.

N.T. at 11-15; R.R. at 25a-29a.

Starayeva again requested that the individual whose business card Starayeva presented to Officer Swoyer be present. Starayeva informed Officer Swoyer that the individual was a police officer. Officer Swoyer "tried to establish that we could communicate by writing." N.T. at 20; R.R. at 34a. Officer Swoyer informed her that it would not be possible for the individual to come from Chester

to Hatboro. Officer Swoyer testified, “I couldn’t afford to wait that long, coupled with the fact that I didn’t know who this individual was and what their specific relationship was.” N.T. at 20; R.R. at 34a. Starayeva again requested in writing that the individual be permitted to assist her because he spoke Russian and knew sign language. N.T. at 26; R.R. at 40a. When Officer Swoyer again wrote that they could communicate by writing, Starayeva wrote, “I can’t undy [sic] English.” N.T. at 26-27; R.R. at 40a-41a. Starayeva requested an interpreter. N.T. at 28; R.R. at 42a.

Officer Swoyer wanted Starayeva to read PennDOT Form DL-26, which contained the Implied Consent Law and O’Connell warnings. Officer Swoyer testified:

I gave her the DL26, and I asked her to read it. I pushed it before her, and I said, read this, you need to read this. . . . She saw the paper. . . . She pushed it away. Her attitude . . . during the entire time was at the police station . . . was belligerent, and I didn’t feel that she wanted to communicate with me. So she didn’t refuse the test out of hand by saying specifically I refuse the breath test. But the totality of her behavior and actions were such that I didn’t believe it was possible for me to administer the breath test on her.

N.T. at 30, 32; R.R. at 44a, 46a.

Officer Swoyer did not communicate in writing that he wanted Starayeva to read the form. N.T. at 31; R.R. at 45a. On cross-examination, Officer Swoyer admitted he would call an interpreter if he arrested someone who spoke Spanish and not English if he needed to question the person. N.T. at 41; R.R. at 55a. He admitted that he did not call an interpreter. N.T. at 43; R.R. at 57a.

By order dated November 8, 2010, the trial court sustained Starayeva's appeal:

PennDOT's claim that handing the DL-26 Form was an appropriate means of communicating the O'Connell warnings based upon the pattern of written communication developed between Petitioner [Starayeva] and Officer Swoyer is without merit. Handing the Form to Petitioner [Starayeva], without writing or saying anything, was not in accordance with the previously established pattern of communication testified to by the Officer. Claiming that Petitioner [Starayeva] obstructed to or frustrated the administration of the chemical test warnings was also meritless given that Petitioner [Starayeva] merely pushed the DL-26 Form away and the Officer never orally read the warnings or provided a written instruction directing Petitioner [Starayeva] to read the DL-26 Form. Petitioner's [Starayeva] right to a knowing and conscious refusal was also violated when the Officer failed to inform her that she was not entitled to the services of a sign language interpreter before refusing the breathalyzer test. PennDOT has failed to meet its burden of proving that Petitioner [Starayeva] was informed that a refusal would result in suspension of her license.

Trial Court Opinion, January 31, 2011, at 9-10; R.R. at 146a-147a.³

DOT contends⁴ that the trial court committed an error of law when it held that DOT failed to prove that Officer Swoyer informed Starayeva of the implied consent warnings.⁵

³ DOT's requests for reconsideration and to vacate were denied by order dated November 19, 2010.

⁴ This Court's review is limited to determining whether the trial court's findings are supported by competent evidence, whether errors of law were committed, or whether the trial court committed an abuse of discretion in making its determination. Department of Transportation v. Renwick, 543 Pa. 122, 669 A.2d 934 (1996).

DOT asserts that Officer Swoyer sufficiently informed Starayeva of the implied consent warnings. From the time Officer Swoyer first encountered Starayeva at the traffic stop, Officer Swoyer communicated with Starayeva through written notes. Officer Swoyer would write something on a piece of paper, show it to Starayeva, she would read it, and then she would respond in writing herself. With respect to the DL-26 Form, Officer Swoyer testified “I gave her the DL26, and I asked her to read it. I pushed it before her, and I said, read this, you need to read this.” N.T. at 30; R.R. at 44a.

The trial court determined that Officer Swoyer failed to follow the pattern of written communication that he established because he did not write on a piece of paper that he wanted Starayeva to read the form before he gave it to her. This Court agrees with DOT that Officer Swoyer’s failure to give Starayeva a written instruction to read the form was not inconsistent with their pattern of communication. Rather, Officer Swoyer would write something and present it to Starayeva for her to read. She understood what she read based on her responses to

(continued...)

⁵ In cases involving the suspension of a driver’s license for a refusal to submit to chemical testing, DOT must prove: 1) that the licensee was placed under arrest for driving under the influence of alcohol by a police officer who had reasonable grounds to believe that he was operating or was in actual physical control of the movement of the vehicle while under the influence of alcohol; 2) that he was requested to submit to chemical testing; 3) that he was informed that a refusal to submit to such testing would result in a suspension of his operating privileges; and 4) that the licensee refused to submit to the test. Banner v. Department of Transportation, Bureau of Driver Licensing, 558 Pa. 439, 737 A.2d 103 (1999). Once DOT meets that burden, the licensee has the burden to prove that (1) he was physically incapable of completing the breath test or (2) his refusal was not knowing and conscious. Department of Transportation, Bureau of Driver Licensing v. Boucher, 547 Pa. 440, 691 A.2d 450 (1997).

Officer Swoyer. With respect to the DL-26 Form, Officer Swoyer bracketed the area he especially wanted Starayeva to read and pushed it across the table to her. She glanced at it, pushed it away, and declined to read it.

While the trial court erred when it determined that Officer Swoyer's action was contrary to their prior pattern of communication, this Court must still determine whether DOT established that Starayeva was informed that her refusal to submit to chemical testing would result in a one year suspension of her operating privilege because he did not read the warnings to her.

In Harris v. Department of Transportation, Bureau of Driver Licensing, 969 A.2d 30 (Pa. Cmwlth. 2009), Olius Harris (Harris) was placed under arrest for driving under the influence of alcohol and transported to a hospital for the purpose of obtaining a blood sample. At the hospital Pennsylvania State Trooper Alan R. MacMurray (Trooper MacMurray) read the first two paragraphs of the DL-26 Form to Harris who stated that he refused to give blood. Trooper MacMurray began reading the next paragraph which contained the language that a refusal would result in the suspension of the operating privilege. Before Trooper MacMurray read halfway through the first sentence, Harris stated that he was not going to sign anything that he did not read himself. Trooper MacMurray handed the form to Harris who read it and, after asking a question of Trooper MacMurray, signed it. Harris, 969 A.2d at 31.

DOT suspended Harris's operating privilege. Harris appealed to the Court of Common Pleas of Delaware County which affirmed. Harris then

appealed to this Court and asserted that because Trooper MacMurray did not advise him that his license would be suspended if he refused to submit to chemical testing, he did not make a knowing and conscious refusal to submit to chemical testing. Harris, 969 A.2d at 31.

This Court held:

Accordingly, we hold that where an officer attempts to orally inform a licensee of his rights by reading Form DL-26, and the licensee interrupts such reading, specifically by requesting to read the warnings himself, and the officer furnishes a typewritten copy of the warnings, if the licensee thereafter refuses chemical testing, that refusal shall be deemed an informed refusal.

Harris, 969 A.2d at 32.

While Harris is factually different from the present case, it does serve to illustrate that the DL-26 Form does not have to be read by the police officer in order to satisfy the requirement that the licensee be informed of the consequences of the refusal if the licensee reads the warning himself. Here, Officer Swoyer reasoned that Starayeva would better understand the warnings if she read them given her disability and because that was how they communicated. Starayeva was given every opportunity to read the warnings but refused after glancing at them.

DOT also contends that the trial court erred when it determined that Officer Swoyer was required to inform Starayeva that she was entitled to the services of an interpreter if she so desired. In Martinovic v. Department of Transportation, Bureau of Driver Licensing, 881 A.2d 30 (Pa. Cmwlth. 2005), Ivo Martinovic (Martinovic), a native of Bosnia, was arrested for driving under the

influence of alcohol. Martinovic told the arresting officer that he would submit to a chemical test but then failed to blow an adequate sample. The police officer, Officer Timothy Hutcheson, marked the failure as a refusal. DOT suspended Martinovic's license. Martinovic appealed the suspension to the Court of Common Pleas of Cumberland County which sustained the appeal in part because Martinovic established that he did not read or understand English sufficiently to have possibly understood the warnings. DOT appealed to this Court. Martinovic, 881 A.2d at 31-34.

This Court reversed:

Although the trial court found that Licensee (Martinovic) did not speak English sufficiently to have understood the O'Connell warnings, whether Licensee (Martinovic) understands the O'Connell warnings or not is inconsequential. An officer's sole duty is to *inform* motorists of the implied consent warnings; once they have done so, they have satisfied their obligation. Department of Transportation, Bureau of Driver Licensing v. Scott, 546 Pa. 241, 684 A.2d 539 (1996). Additionally, and not without significance in this case, officers have no duty to make sure that licensees understand the O'Connell warnings or the consequences of refusing a chemical test. . . . It is equally not the officer's duty to enlist the assistance of an interpreter to make sure a motorist understands implied consent warnings.

Martinovic, 881 A.2d at 35.

Under Martinovic, a police officer has no duty to make sure the licensee understands the warnings and no obligation to provide or permit an interpreter.⁶

Accordingly, this Court reverses.

BERNARD L. McGINLEY, Judge

⁶ The trial court cited Department of Transportation, Bureau of Driver Licensing v. Gaertner, 589 A.2d 272 (Pa. Cmwlth. 1991) when it concluded that Starayeva was entitled to an interpreter. However, in light of Department of Transportation, Bureau of Driver Licensing v. Scott, 546 Pa. 241, 684 A.2d 539 (1996), cited in Martinovic, which held that a police officer's duty was limited to informing a licensee of the consequences of a refusal, it would appear that Gaertner may have been implicitly overruled. More importantly, Gaertner is factually distinguishable from the present case because there the licensee testified, through an interpreter, that he did not understand the warnings and an expert in the field of deaf and hearing impaired communications testified on behalf of the licensee that the licensee could only understand simple words and phrases and could not understand the police officer without the aid of an interpreter.

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ORDER

AND NOW, this 24th day of October, 2011, the order of the Court of Common Pleas of Montgomery County in the above-captioned matter is reversed.

BERNARD L. MCGINLEY, Judge

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 Appellant :

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 HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**CONCURRING OPINION
BY JUDGE COHN JUBELIRER**

FILED: October 24, 2011

While I agree with the Majority's disposition of the trial court's order and most of the Majority's rationale, I write separately because I do not think it is necessary to rely on Martinovic v. Department of Transportation, Bureau of Driver Licensing, 881 A.2d 30 (Pa. Cmwlth. 2005), to establish that Officer Swoyer informed Starayeva that her license would be suspended for one year if she refused to submit to chemical testing. The Majority properly determined that by marking the relevant portion of the DL-26 Form¹ and presenting it to Starayeva, Officer Swoyer was continuing the prior pattern of communication he and Starayeva had

¹ Unlike the Dissent, I do not believe it is relevant that the DL-26 Form was pre-printed rather than written on the spot by Officer Swoyer; it is still a written communication.

established. By presenting her with the DL-26 Form, Officer Swoyer informed Starayeva of the warnings contained therein. I do not believe further analysis on this point is necessary.

RENÉE COHN JUBELIRER, Judge

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 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
 BY SENIOR JUDGE FRIEDMAN

FILED: October 24, 2011

I respectfully dissent. The majority concludes that Officer Christopher Swoyer’s failure to give Alesya Starayeva, a hearing-impaired and Russian-speaking licensee, a written instruction to read the DL-26 form was “not inconsistent with their pattern of communication.” (Majority Op. at 7.) Therefore, the majority holds that Starayeva was specifically warned that a refusal to submit to chemical testing would result in the revocation of her driver’s license. *See Department of Transportation, Bureau of Traffic Safety v. O’Connell*, 521 Pa. 242, 248-49, 555 A.2d 873, 876 (1989) (requiring an officer to specifically warn a licensee that a refusal to submit to chemical testing would result in the revocation of her driver’s license). For the following reasons, I disagree.

Initially, I note that the trial court made a factual finding regarding the pattern of communication, as well as a finding that Officer Swoyer's actions in attempting to give Starayeva the implied consent warnings **were inconsistent** with that pattern of communication.

[DOT's] claim that handing the DL-26 Form was an appropriate means of communicating the *O'Connell* warnings based upon the pattern of written communication developed between [Licensee] and Officer Swoyer is without merit. *Handing the Form to [Licensee], without writing or saying anything, was not in accordance with the previously established pattern of communication testified to by the Officer.* Claiming that [Licensee] obstructed or frustrated the administration of the chemical test warnings was also meritless given that [Licensee] merely pushed the DL-26 Form away and *the Officer never orally read the warnings or provided a written instruction directing [Licensee] to read the DL-26 Form.* [Licensee's] right to a knowing and conscious refusal was also violated when the Officer failed to inform her that she was not entitled to the services of a sign language interpreter before refusing the breathalyzer test. [DOT] has failed to meet its burden of proving that [Licensee] was informed that a refusal would result in suspension of her license.

(Tr. Ct. Op., 1/31/11, at 9-10.) (emphasis added).

Indeed, the pattern of communication was that Officer Swoyer (1) wrote an instruction and (2) handed it to Starayeva. In attempting to give the implied consent warnings, Officer Swoyer did **not** write any instruction. The officer merely handed Starayeva the DL-26 form. Writing an instruction would not have been overly burdensome. Moreover, absent a written instruction, Officer Swoyer could not reasonably expect Starayeva to know what to do with the DL-26 form. Thus, in my

view, Officer Swoyer failed to “specifically warn” Starayeva about the results of a refusal to submit to chemical testing.¹

Accordingly, I would affirm the trial court.

ROCHELLE S. FRIEDMAN, Senior Judge

¹ Although Officer Swoyer had no legal duty to produce a Russian interpreter, the fact that he failed to do so supports the trial court’s conclusion Officer Swoyer never actually gave Starayeva the implied consent warnings.