IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ray Allen Highberger,	:	
Appellant	:	
	:	
v.	:	No. 278 C.D. 2008
	:	Submitted: June 20, 2008
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: July 25, 2008

Ray Allen Highberger (Licensee) appeals from an order of the Court of Common Pleas of Indiana County (trial court), affirming a one-year suspension of his operating privileges imposed by the Department of Transportation, Bureau of Driver Licensing (DOT) for his refusal to submit to chemical testing pursuant to Section 1547(b)(1) of the Vehicle Code (Code).[1] We now affirm.

On May 8, 2007, while on routine patrol in a marked police vehicle, Corporal Janelle Lydic of the Blairsville Police Department noticed a pickup truck

[1] Section 1547(b)(1) of the Code, 75 Pa. C.S. § 1547(b)(1), commonly referred to as the Implied Consent Law, provides as follows:

> If any person placed under arrest for a violation of section 3802 (relating to driving under the 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 [DOT] shall suspend the operating privilege of the person for a period of 12 months.

being driven by Licensee at a speed of about ten miles per hour. After seeing the truck rounding a corner and nearly crossing into the opposite lane, Corporal Lydic followed the truck for a few blocks. When Corporal Lydic observed Licensee pull the truck into a parking space without using a turn signal, she stopped behind it and activated her overhead lights. Corporal Lydic approached the truck and asked Licensee for his driver's license, registration and insurance card. Upon doing so, she detected an odor of an alcoholic beverage on his breath, noticed his glassy eyes and observed that his speech was slurred. Corporal Lydic then asked Licensee to step out of his truck.

When he stepped out of the truck, Licensee stumbled and held onto the side of the truck while making his way towards the back. Corporal Lydic asked Licensee to perform four standard field sobriety tests.[2] Licensee failed to successfully perform any of the four tests. Corporal Lydic placed him under arrest for suspected driving under the influence of alcohol (DUI) and transported him to the Blairsville Police Department in her police car.[3]

At the police station, Corporal Lydic read Licensee the warnings contained on DOT's DL-26 form and then asked him to take a breath test. Licensee agreed to submit to the breath test. Corporal Lydic explained to Licensee that he should not hold his breath but should supply a sufficient amount of air for the machine to produce a reading. On his first attempt, Licensee appeared to be holding his breath and the machine indicated that he did not provide a sufficient breath sample. Corporal Lydic replaced the mouthpiece on the machine and instructed Licensee to try again. Prompted

[2] Corporal Lydic asked Licensee to perform the eye stigma test, the walk/turn with heel to toe test, the 1-2-3-4 counting test and the "coins on the ground" test. (N.T. at 18).

[3] See Section 3802(a) of the Code, 75 Pa. C.S. § 3802(a).

by a second insufficient breath sample, the machine printed out a ticket indicating a refusal. Corporal Lydic informed Licensee of the refusal.

Then, Corporal Lydic asked Licensee if he would submit to a blood test. He agreed, and Corporal Lydic placed him in her police car to transport him to the local hospital for the blood test. However, on the way to the hospital, Licensee requested to speak with an attorney. Corporal Lydic informed Licensee that his request to speak to an attorney was considered a refusal, as indicated on the DL-26 form, and he would therefore have his license suspended for a year.[4] Licensee repeated his request to speak to an attorney and instead of continuing on to the hospital, Corporal Lydic returned to the police station.

Subsequently, on June 15, 2007, DOT notified Licensee that his driver's license was being suspended for one-year for his refusal to submit to chemical testing, effective July 20, 2007 at 12:01 a.m.[5]

On July 9, 2007, Licensee filed a timely statutory appeal of DOT's suspension order to the trial court and alleged that he had not refused to submit to chemical testing. He also alleged that the traffic stop, which resulted in his arrest and

[4] The Pennsylvania Supreme Court has held that when a motorist is requested to submit to a chemical test, the police officer has a duty to inform the motorist that the rights provided by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), are inapplicable to such a request for chemical testing. See Department of Transportation, Bureau of Traffic Safety v. O'Connell, 521 Pa. 242, 555 A.2d 873 (1989). Thus, a police officer must tell the motorist that he has no right to an attorney prior to taking a chemical test. O'Connell, 521 Pa. at 253, 555 A.2d at 878.

[5] DOT also ordered a one-year disqualification of Licensee's Commercial Driver's License (CDL) to begin on the same date.

the subsequent requirement for chemical testing, was improper. A hearing before the trial court was scheduled.[6]

On December 19, 2007, the trial court held a *de novo* hearing on Licensee's appeal.[7] Corporal Lydic appeared and testified as to the traffic stop, the four field sobriety tests, the DUI arrest, Licensee's performance on the breath test and his request for an attorney on the way to the hospital for the blood test. Corporal Lydic testified that she was certified as an operator of the breathalyzer machine and that said machine was calibrated in December of 2006.[8] She identified two copies of DL-26 forms signed by Licensee.[9] Licensee testified at the hearing on his own behalf.[10]

After the hearing and the submission of briefs, the trial court issued findings of fact, conclusions of law and an order affirming DOT's one-year suspension

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[6] The hearing was originally scheduled for November 21, 2007. However, a continuance request by Licensee was granted by the trial court and the hearing was rescheduled for December 19, 2007.

[7] Prior to the start of the hearing, a protracted discussion between the court and counsel for the parties occurred with regard to certain criminal pre-trial motions concerning the legality of the traffic stop. At the end of the discussion, the court denied Licensee's motion for a continuance and proceeded with the hearing regarding Licensee's appeal on the refusal issue. (N.T. at 4-14).

[8] Corporal Lydic testified that she was certified in 2001 and that the breathalyzer machine was certified for accuracy on May 1, 2007, with such certification required on a monthly basis.

[9] These exhibits were admitted into evidence without objection.

[10] Licensee admitted that he agreed to take the breath test but indicated that Corporal Lydic did not show him how to take the test. He stated that when he breathed into the machine, he "recalled numbers coming up." (N.T. at 68). Licensee testified that he could not have spit into the machine as he had "both glands removed" and is "not capable of spitting." (N.T. at 69). He also testified that he blew into the machine "[t]o the best of [his] ability." Id. He stated that he did not remember all of the warnings being given by Corporal Lydic and that he did not realize that asking for an attorney was viewed as a refusal. Licensee also testified that he was not given the second DL-26 form to sign until he returned to the police station after requesting to speak to an attorney.

of Licensee's operating privileges. The trial court concluded that Licensee did not make a conscious effort to take the test by supplying a sufficient breath sample for the machine to read and thus, according to law, he refused to submit to the chemical testing. Licensee now appeals to this Court.

On appeal,[11] Licensee argues that the trial court erred in finding that he refused the chemical testing as the competent evidence of record does not support such a finding. We disagree.

In order to suspend a licensee's operating privilege under Section 1547(b)(1) of the Code, DOT must establish the following: (1) that the licensee was arrested for driving while intoxicated and that the arresting officer had reasonable grounds to believe that the licensee was driving while intoxicated; (2) that the licensee was requested to submit to a chemical test; (3) that the licensee refused the test; and (4) that the licensee was warned that refusing the test would result in a suspension. Postgate v. Department of Transportation, Bureau of Driver Licensing, 781 A.2d 276 (Pa. Cmwlth. 2001), petition for allowance of appeal denied, 568 Pa. 689, 796 A.2d 320 (2002).[12]

Further, in Pappas, we identified two methods that DOT may utilize to establish that a licensee refused chemical testing; first, by failing to provide sufficient

[11] Our scope of review of the trial court's opinion is limited to determining whether findings of fact are supported by substantial evidence and whether the trial court committed an error of law or an abuse of discretion. Pappas v. Department of Transportation, Bureau of Driver Licensing, 669 A.2d 504 (Pa. Cmwlth. 1996). Furthermore, questions of credibility and conflicts in the evidence are for the trial court to resolve. Id. If there is sufficient evidence in the record to support the findings of the trial court, we must pay proper deference to the trial court as fact finder and affirm. Id.

[12] Furthermore, our Supreme Court has held that the issue of whether a licensee refused a chemical test is a question of law, subject to plenary review by an appellate court. See Todd v. Department of Transportation, Bureau of Driver Licensing, 555 Pa. 193, 723 A.2d 655 (1999).

breath samples via testimony of the administering officer, and second, via a printout from the breath test machine. Where a licensee fails to make a total conscious effort to take a breath test, and thereby fails to provide a sufficient breath sample, such conduct is tantamount to refusing the test. See Postgate.[13] Additionally, this Court has held that the failure to complete a breath test, whether or not a good faith effort was made to do so, constitutes a per se refusal. Sweeney v. Department of Transportation, Bureau of Driver Licensing, 804 A.2d 685 (Pa. Cmwlth. 2002).

Additionally, once DOT has presented evidence that the licensee failed to provide sufficient breath samples, a refusal is presumed and the burden of proof then shifts to the licensee to establish by competent medical evidence that he or she was physically unable to perform the test. Pappas.

In the present case, Licensee argues that DOT did not establish that he refused to take the test. He argues that he was not given a "full, fair and reasonable opportunity to complete the breath test" because it was Corporal Lydic who prematurely "terminated" and interrupted the breath test at a time when he was still willing to continue to take the test. (Licensee's Brief at 9). Licensee argues that Corporal Lydic did not provide him with the opportunity to give "two consecutive actual breath tests, without a waiting period between the two tests." (Licensee's Brief at 12). He argues that Corporal Lydic did not deem his attempt at providing a breath sample as a refusal or she would not have requested that he provide a blood test.

[13] Moreover, our Supreme Court has held that the failure to provide sufficient breath samples, even after being afforded three opportunities, was a refusal, even though the officer terminated the test before the expiration of the three-minute test cycle, thereby warranting the suspension of a driver's license. Todd.

The trial court concluded that Corporal Lydic's testimony was credible. (Trial Court Opinion at 1). The trial court found that, based on Corporal Lydic's testimony, Licensee refused to take the chemical test because he did not make a conscious effort to take the test by supplying a sufficient breath sample for the machine to read. (Trial Court Opinion at 4). Corporal Lydic testified at the hearing before the trial court that she read the DL-26 warnings to Licensee, explained the process, had him blow into the breathalyzer machine and noticed that he held his breath. (N.T. at 25). She then told him that he could not hold his breath and had him breathe into the machine a second time. Corporal Lydic testified that his second attempt resulted in a second insufficient sample and that Licensee had placed saliva into the mouthpiece. Id. She testified that, after the second insufficient sample, the breathalyzer machine printed out a ticket with a notation of a "refusal." (N.T. at 27). Corporal Lydic testified that she did not allow Licensee an additional attempt but offered a blood test as an alternative.

Although Licensee blames his refusal on Corporal Lydic for stopping the test and interrupting his willingness to complete the breath test, such an argument erroneously places responsibility for completing the test on her. Her termination of Licensee's breath test only occurred **after** he gave two insufficient breath samples. He does not allege that, at any time prior to or during the time he was providing his two breath samples, Corporal Lydic interrupted or terminated his performance. Only after he twice failed to provide adequate samples and the breathalyzer machine indicated a refusal on the printed ticket did she terminate the test. (R.R. at 28a). Licensee admits that Corporal Lydic told him that the first breath sample was "not acceptable." (N.T. at 68). Thus, we cannot say that the trial court erred in concluding that the evidence of record, i.e., two insufficient breath samples, amounts to a refusal by Licensee.

As the trial court properly concluded that Licensee refused to take the breath test, we will next consider if he met his burden of proving that he was physically unable to complete the test. Licensee does not argue that he was prevented from providing an adequate breath sample due to a medical condition. He testified that he could not have spit into the machine as he had "both glands removed" and was "not capable of spitting." (N.T. at 69). He also testified that he blew into the machine "[t]o the best of [his] ability." Id. As Licensee did not allege or set forth any competent medical evidence to indicate that he was unable to provide sufficient breath samples because of a medical condition, he did not meet his burden in this regard.

Accordingly, the order of the trial court is affirmed.[14]

JOSEPH F. McCLOSKEY, Senior Judge

[14] We note that Licensee raises additional arguments in his brief to this Court concerning the blood test, his request to speak to an attorney and the consequences resulting therefrom. However, at the hearing before the trial court, counsel for DOT indicated that the suspension was based solely on Licensee's failure to provide sufficient breath samples. See N.T. at 78. The trial court's decision references only these insufficient samples as constituting a refusal. Hence, any arguments by Licensee regarding the blood test or his request to speak to an attorney are not relevant to the outcome of this case.

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O R D E R

AND NOW, this 25th day of July, 2008, the order of the Court of Common Pleas of Indiana County is hereby affirmed.

JOSEPH F. McCLOSKEY, Senior Judge