IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Paul D. Selestow	:	
	:	
v.	:	No. 31 C.D. 2008
	:	
Commonwealth of Pennsylvania,	:	Submitted: June 20, 2008
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: August 28, 2008**

The Department of Transportation, Bureau of Driver Licensing (PennDOT) appeals an order of the Court of Common Pleas of Allegheny County (trial court) that sustained Paul D. Selestow's (Licensee) appeal of a one-year suspension of his operating privilege based on his reported refusal to submit to chemical testing.[1] The trial court determined Licensee sustained injuries during his arrest for driving under the influence of alcohol (DUI) that rendered him physically

[1] See Section 1547 of the Vehicle Code, 75 Pa. C.S. §1547. Section 1547 is commonly referred to as the "Implied Consent Law." This Section states any person who drives a vehicle in the Commonwealth is deemed to have given his consent to one or more chemical tests of breath, blood or urine for purposes of determining blood alcohol content if a police officer has reasonable grounds to believe the person drove the vehicle under the influence of alcohol or a controlled substance. Section 1547(b)(1)(i) states, "If any person placed under arrest [for driving under the influence of alcohol] is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice the department shall suspend the operating privilege of the person … for a period of 12 months." 75 Pa. C.S. §1547(b)(1)(i).

incapable of completing a breathalyzer test. Because the record lacks sufficient evidence to support the trial court's determination, we reverse.

The facts of this case are as follows. PennDOT notified Licensee of a one-year suspension of his operating privilege as a result of his reported refusal to submit to chemical testing. Licensee filed a statutory appeal with the trial court.

At hearing before the trial court, PennDOT presented the testimony of Forward Township Police Officer Jason Miller, who testified he observed Licensee commit a moving violation and, as a result, he sought to effectuate a routine traffic stop. Officer Miller explained when he attempted to stop Licensee's vehicle, Licensee "took off at a high rate of speed." Reproduced Record (R.R.) at 14a. Officer Miller testified Licensee "eventually went to his place of employment where he exited his vehicle, refused to submit to [Officer Miller's] commands to stop [and] return to his vehicle[,] at which point [Officer Miller] approached [Licensee], [and] a physical altercation occurred …." R.R. at 14a-15a.

After the altercation, Officer Miller placed Licensee into his patrol car and transported him to the police station. Officer Miller testified at the station, he read Licensee the implied consent warnings from the DL-26 Form, and Licensee refused to submit to testing. Officer Miller explained after Licensee's initial refusal, another officer, Sergeant Glen Fine, spoke with Licensee, and he ultimately agreed to submit to a breathalyzer test.

Officer Miller testified he administered the test. After obtaining a valid breath sample, Officer Miller attempted to obtain a second valid sample; however, Licensee blew into the breathalyzer machine in such a shallow manner that no further valid reading occurred, despite three attempts. Officer Miller explained, "on three consecutive times [I] asked him to continue to breathe into the unit, at which time he would again shallow breathe. I constituted him a refusal." R.R. at 26a. Officer Miller also testified the breathalyzer machine printed out a ticket that indicated a refusal occurred.

Officer Miller further testified he transported Licensee to the Allegheny County jail; however, a nurse at the jail advised him to take Licensee to the hospital for medical attention.

In response, Licensee testified he "bumped" his head when Officer Miller placed him in the patrol car. R.R. at 38a. As a result, he testified he "felt real dizzy, had shortness of breath," and at one point, he "passed out" at the police station. Id. Licensee also testified he did, in fact, agree to submit to the breath test, but he was incapable of breathing into the machine properly because of his injuries. Licensee further testified he was admitted to the hospital and released the next day. He characterized the injury he sustained as "head trauma." R.R. at 39a.

The trial court determined Licensee suffered sufficient injury that the Allegheny County jail refused to house him and directed Officer Miller to transport him to the hospital. Although Licensee did not present medical testimony to

establish the extent of his condition, the trial court noted, he testified he was admitted to the hospital and spent the night there.

Ultimately, the trial court sustained Licensee's appeal of the license suspension, explaining:

> [Licensee's] argument rests on his assertion that he submitted to the chemical breath test and that there was no refusal. Evidence on both sides of the record indicates that [Licensee] did blow into the machine at least three times. He testified to his recollection, while Officer Miller testified that he breathed thrice in a shallow manner (so as to imply to the Court that [Licensee] was attempting to ruin the test results). The Court is satisfied that factually [Licensee] submitted.
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> A *knowing and conscious* refusal is necessary to warrant suspension. [Cartwright v. Commonwealth, 587 A.2d 909 (Pa. Cmwlth. 1991)]. In the present case, refusal of any kind is absent.
>
> The Commonwealth attempting to go forward with the contention that [Licensee's] failure to provide a sufficient breath sample constituted a refusal pursuant to the law, [Licensee] asserts that his medical condition – characterized by shortness of breath, some unconsciousness and dizziness – prevented him from breathing properly to effectuate a sample. The Commonwealth argued that medical testimony was necessary to establish his inability to perform. This Court finds to the contrary.
>
> Generally, presentment of competent medical testimony is necessary to establish incapacity to take or refuse a chemical test. However, excepted from the rule is the occasion where the driver's injury is obvious. *See, e.g.*, [McQuaide v. Dep't of Transp., Bureau of Driver Licensing, 647 A.2d 299 (Pa. Cmwlth. 1994)], where the Commonwealth Court held that medical opinion is not

> necessary when severe, incapacitating injuries are obvious. In the present case, it is uncontroverted that [Licensee] sustained injury upon his entry into the patrol car. It is also conceded that hours later the nurse at the Allegheny County jail determined that Licensee presented in need of medical attention. Accordingly, this Court is satisfied that [Licensee's] injuries and poor condition were likely obvious at the time of the testing. His incapacity to provide a valid sample did not warrant a chemical test refusal.

Tr. Ct., Slip Op. at 2-3 (emphasis added). This appeal by PennDOT followed.

On appeal,[2] PennDOT argues Officer Miller's credible testimony, together with the admission of the DL-26 Form and the BAC Datamaster ticket, satisfied its burden of proving Licensee refused chemical testing. PennDOT points out there was no significant difference between the testimony of Officer Miller and that of Licensee. PennDOT contends Licensee twice refused requests from Officer Miller to submit to a breath test after the officer finished reading the Implied Consent warnings. PennDOT argues Licensee only agreed to take the test after Sergeant Fine spoke with him. Because Licensee never successfully completed a test, PennDOT maintains, his original refusal was not vitiated.

PennDOT further argues Licensee was barred from raising the defense that he was physically incapable of completing a breath test because he never informed Officer Miller that he was experiencing any breathing difficulties. In any event, PennDOT maintains, Licensee did not satisfy his burden of proving he was

[2] Our review is limited to determining whether the trial court committed an error of law or abused its discretion, and whether necessary findings were supported by substantial evidence. Reinhart v. Dep't of Transp., Bureau of Driver Licensing, 946 A.2d 167 (Pa. Cmwlth. 2008).

physically incapable of completing a breath test or that he was unable to make a knowing and conscious decision to refuse chemical testing.

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 his refusal was not knowing or that he was physically unable to take the test. Id.

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 anything less than an unqualified, unequivocal assent constitutes a refusal. Id. Further, a motorist's refusal need not be expressed in words; rather, a motorist's conduct may demonstrate a refusal to submit to chemical testing. Id.

The law in Pennsylvania provides "where a [licensee], when taking a breathalyzer test, does not exert a total conscious effort, and thereby fails to supply a sufficient breath sample, such is tantamount to a refusal to take the test." Pappas v. Dep't of Transp., Bureau of Driver Licensing, 669 A.2d 504, 508 (Pa. Cmwlth. 1996) (quoting In re Budd, 442 A.2d 404, 406 (Pa. Cmwlth. 1982)); see also Dep't of Transp., Bureau of Driver Licensing v. Kilrain, 593 A.2d 932 (Pa. Cmwlth.

1991)). "Even a license's [sic] good faith attempt to comply with the test constitutes a refusal where the licensee fails to supply a sufficient breath sample." Pappas, 669 A.2d at 508; see also Mueller v. Dep't of Transp., Bureau of Driver Licensing, 657 A.2d 90 (Pa. Cmwlth. 1995).

Our decision in Mueller is instructive. There, the licensee testified he complied with the police officer's request to submit to chemical testing and that the breath sample he gave was all that he was physically capable of providing. The trial court sustained the licensee's appeal of his license suspension, stating "in spite of the fact that a usable sample was not provided by [the licensee] … [the licensee] made several good faith efforts to comply with the officer's request." Id. at 92.

On appeal, this Court reviewed the record and noted the licensee testified he agreed to submit to chemical testing, but due to sinus problems he was unable to provide a sufficient breath sample. We stated that the licensee did not present any medical evidence to establish his sinus condition prevented him from properly performing the breathalyzer test. There, we reiterated the well-established principle that "[a] failure to supply breath sufficient to actuate the test shifts the burden to the licensee to prove by competent medical evidence that he was physically unable to take the test." Id. at 95.

Here, it is clear from the testimony of both Licensee and Officer Miller that Licensee did not provide a sufficient breath sample for the breathalyzer machine. R.R. at 25a-26a, 38a. Contrary to the trial courts' determination, this constituted a refusal as a matter of law. Pappas; Mueller; Kilrain. Thus, the

burden shifted to Licensee to prove through competent medical evidence that he was physically incapable of performing the test. Pappas; Gordon v. Dep't of Transp., Bureau of Driver Licensing, 707 A.2d 1195 (Pa. Cmwlth. 1998).

"Where … injuries are not obviously incapacitating, a licensee must present competent medical testimony that a knowing and conscious refusal could not be made. Medical evidence is not a *per se* requirement; however, absent competent medical testimony, 'bare assertions' of physical incapacity are insufficient." Dep't of Transp., Bureau of Driver Licensing v. Holsten, 615 A.2d 113, 115 (Pa. Cmwlth. 1992); see also Wright v. Dep't of Transp., Bureau of Driver Licensing, 788 A.2d 443 (Pa. Cmwlth. 2001).

Here, Licensee did not present medical evidence or even his own hospital records to describe his injury or prove he was physically incapable of performing the breathalyzer test. Rather, he offered his bare assertion of physical incapacity.

The trial court made no finding as to the nature or extent of Licensee's injury. Instead, based on the actions of the jail nurse, the trial court found that Licensee's undescribed "injuries and poor condition were likely obvious" several hours earlier, at the time of testing. In the absence of medical evidence, this is insufficient for Licensee to meet his burden of proving he suffered from a severe, obvious and incapacitating injury that rendered him incapable of performing the breath test. Holsten.

Moreover, this is not a case like McQuaide, relied upon by both Licensee and the trial court. There, we held medical evidence was not necessary to prove a licensee could not knowingly and consciously refuse to submit to a blood alcohol test where he sustained obvious, severe, incapacitating injuries resulting from a motor vehicle accident as well as being hit over the head with a tire iron after the accident. The licensee there explained his injuries included a broken nose and a broken collar bone as well as three or four stitches under his eye, which was swollen shut. We stated, "[a]lthough [the] [l]icensee did not present any medical evidence in support of his refusal at trial, we believe that such testimony was unnecessary in light of the obvious severity and incapacitating effects of [the] [l]icensee's injuries." Id. at 302.

Unlike the licensee in McQuaide, Licensee here testified he "bumped" his head while being placed into Officer Miller's patrol car. R.R. at 38a. Although Licensee testified he suffered "head trauma," he offered no evidence concerning any specific injury he sustained that could be characterized as "obvious," "severe" and "incapacitating." Moreover, unlike in McQuaide where the arresting officer acknowledged the licensee sustained severe wounds, here Officer Miller testified he observed no external injuries on Licensee. R.R. at 19a. Therefore, McQuaide is simply inapplicable here.[3]

[3] PennDOT also asserts Licensee did not prove alcohol consumption played no part in his actions. Zwibel v. Dep't of Transp., Bureau of Driver Licensing, 832 A.2d 599 (Pa. Cmwlth. 2003); Dailey v. Dep't of Transp., Bureau of Driver Licensing, 722 A.2d 772 (Pa. Cmwlth. 1999). Because of the way we resolve the foregoing arguments, further discussion of this point is unnecessary.

We also distinguish Carlin v. Department of Transportation, Bureau of Driver Licensing, 739 A.2d 656 (Pa. Cmwlth. 1999), relied on by Licensee for the proposition that medical testimony is not always necessary to prove physical incapacity to take a breath test. In Carlin, the cause of the licensee's physical inability was his overwhelming need to urinate, and his repeated requests to do so were denied. This Court determined that a medical question was not involved, and therefore expert medical opinion was not needed. Id. at 660-61; see also Flanigan v. Dep't of Transp., Bureau of Driver Licensing, 806 A.2d 524 (Pa. Cmwlth. 2002) (Carlin distinguished because no medical question involved in that case). In contrast, here Licensee raised a medical question involving his claimed severe, obvious and incapacitating injury.

Based on the foregoing discussion, we reverse.

ROBERT SIMPSON, Judge

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Appellant	:	

O R D E R

AND NOW, this 28th day of August, 2008, the order of the Court of Common Pleas of Allegheny County is **REVERSED**.

ROBERT SIMPSON, Judge