IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing, Appellant	:	
v.	:	No. 488 C.D. 2008
	:	Submitted: August 15, 2008
Erin Schuenemann	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: October 14, 2008

The Pennsylvania Department of Transportation, Bureau of Driver Licensing (PennDOT), appeals an order of the Court of Common Pleas of Dauphin County (trial court) sustaining Erin Schuenemann's (Licensee) statutory appeal of the suspension of her driving privileges for refusing to submit to chemical testing pursuant to Section 1547(b)(1)(ii)(A) of the Vehicle Code.[1] PennDOT contends that the trial court erred in ruling that Licensee's conduct did not constitute a

[1] 75 Pa. C.S. §1547(b)(1)(ii)(A). That section provides, in pertinent part, that 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 department shall suspend the operating privilege of the person … [f]or a period of 18 months if … [t]he person's operating privileges have previously been suspended under this subsection." Licensee's driving privilege was suspended for a refusal which occurred on March 24, 2000. This prior suspension resulted in the enhancement of her present suspension sentence.

refusal to submit to chemical testing. Because there is not sufficient evidence in the record to support the findings of the trial court, we will reverse its order and remand for further proceedings.

On October 18, 2007, Pennsylvania State Troopers Brian Wolfe and Christopher Erdman were dispatched to a one-vehicle crash in Dauphin County. Licensee was the driver of the vehicle. Trooper Wolfe testified that he observed Licensee's glassy, bloodshot eyes and slurred speech and detected a strong odor of alcohol. The Troopers refrained from conducting field sobriety tests because of concerns for Licensee's safety and transported her to the Harrisburg Community General Osteopathic Hospital for a blood alcohol test.

At the hospital, Trooper Wolfe read aloud the chemical testing warnings and explained to Licensee that if she refused to take the test, her license would be automatically suspended. Licensee agreed to submit to chemical testing; however, before the phlebotomist arrived, Licensee attempted to leave the hospital. Licensee's attempt was foiled by Troopers Wolfe and Erdman, who returned her to the lab. When the phlebotomist inserted the needle in Licensee's arm, he did not draw any blood. Licensee responded by pulling the needle out of her arm. The phlebotomist stated, "I'm done," and made no further attempts to draw blood from Licensee. Reproduced Record at 21a (R.R. ___). At this point, Trooper Wolfe deemed Licensee's conduct to be a refusal to consent to chemical testing.

Upon report that Licensee refused to submit to chemical testing, PennDOT suspended Licensee's operating privilege for a period of eighteen months, effective December 25, 2007, because it was her second refusal. Licensee filed a statutory appeal to the trial court, and a hearing was held on February 27, 2008.

At the hearing, Licensee testified that the phlebotomist was moving the needle around in her arm, presumably to find a vein, and it caused her pain. She testified that she asked the phlebotomist to remove the needle. Trooper Wolfe testified that he asked Licensee to disclose any injuries or difficulties that would prevent her compliance with the chemical test. Licensee, in turn, admitted that she did not tell the Troopers that she had any problems with the procedure. Trooper Erdman further testified that Licensee was "uncooperative off and on the whole time." R.R. 27a.

The trial court considered the evidence and made the following findings:

> In pulling the needle out of her arm, [Licensee] was not refusing to submit to the chemical test, but rather took objection to the manner in which it was being administered. Clearly the intent of §1547 is not to subject the citizens of this Commonwealth to unnecessary pain.
>
> Inherent in 75 Pa.C.S.A. §1547 is that the requisite chemical test be performed in a reasonable manner. Though extraction of blood samples for the purposes of chemical testing is a fairly common and routine practice, the extraction must be done in a reasonable manner…. Here, the unrebutted testimony of [Licensee] describes the manipulation of the needle by the phlebotomist and the concomitant level of additional pain. The pain described by [Licensee] is unreasonable considering the routine nature of such a procedure and the fact that not a single drop of blood was retrieved. The facts and circumstances surrounding the present issue clearly illustrates that some element of the drawing of blood was "amiss."

R.R. 86a-87a. The trial court found that PennDOT's failure to call the phlebotomist as a witness rendered Licensee's testimony "unrebutted."[2] R.R. 87a. The trial court sustained Licensee's statutory appeal.

In its appeal to this Court,[3] PennDOT raises two issues. First, PennDOT argues that there was no substantial evidence to support the trial court's conclusion that Licensee did not refuse through her conduct to submit to chemical testing. Second, PennDOT contends that the trial court erred in sustaining Licensee's appeal based solely on her testimony that she removed the needle due to pain.

First, we consider whether the evidence supports the trial court's conclusion that Licensee did not refuse by her conduct to submit to chemical testing. To sustain the eighteen-month suspension of Licensee's operating privileges under Section 1547, the Department had to establish that Licensee: (1) was arrested for driving under the influence by a police officer who had reasonable grounds to believe that Licensee was operating or was in actual physical control of the movement of the vehicle while under the influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; (4) was specifically warned that refusal would result in a license suspension; and (5) was subject to an enhanced

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[2] The trial court stated: "Without the testimony of the phlebotomist at the Hearing, this Court cannot engage in speculation or conjecture regarding what was said or not said by [Licensee] as to whether or not a refusal of any effect took place." R.R. 87a.

[3] The issue of whether there was a refusal to submit to chemical testing is a question of law subject to plenary review by this Court. *Mueller v. Department of Transportation, Bureau of Driver Licensing*, 657 A.2d 90, 93 (Pa. Cmwlth. 1995). Our 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." *McCloskey v. Department of Transportation, Bureau of Driver Licensing*, 722 A.2d 1159, 1161 (Pa. Cmwlth. 1999).

suspension of eighteen months' duration under 75 Pa. C.S. §1547(b)(1)(ii). *Quick v. Department of Transportation, Bureau of Driver Licensing*, 915 A.2d 1268, 1271 (Pa. Cmwlth. 2007).

It is well-settled that any response from a licensee that is less than an unqualified, unequivocal assent to a chemical test constitutes a refusal. *Hudson v. Department of Transportation, Bureau of Driver Licensing*, 830 A.2d 594, 599 (Pa. Cmwlth. 2003). A licensee's refusal need not be expressed in words; a licensee's conduct may constitute a refusal to submit to testing. *Id.*

At issue here is whether Licensee refused to submit to chemical testing by pulling the needle from her arm. The trial court found that Licensee told the phlebotomist he was hurting her,[4] and this was the reason she pulled the needle from her arm. PennDOT contends that Licensee's testimony does not support the trial court's fact finding. We agree.

Having examined the transcript, we find that Licensee did *not* testify that she told the phlebotomist or the Troopers why she removed the needle, either before or after she did so. The hearing transcript reads as follows:

> Q. Briefly tell the Court what happened when you had – the phlebotomist attempted to draw the blood.
>
> A. He inserted the needle and was moving it around. I would think trying to find a vein. It was very painful and I asked him to remove it. He did not.
>
> Q. Then you removed it?

[4] Indeed, the trial court so declared multiple times during the hearing. The trial court stated, for example, that "[s]he testified that she articulated to your phlebotomist, 'This is hurting me.'" R.R. 35a. This is the "unrebutted testimony" on which the trial court based its decision. R.R. 86a.

A. It was extremely painful, yes.

Q. *At any time did you tell the troopers that you had any problems or anything?*

A. *No.*

R.R. 28a-29a (emphasis added). Furthermore, Trooper Wolfe testified that he "was sitting right there [through] the whole process," yet he did not hear Licensee inform the phlebotomist that she felt pain. R.R. 23a. Had Licensee actually testified that she asked the phlebotomist to remove the needle because it was extremely painful, a discrepancy would exist between the testimony of Licensee and Trooper Wolfe, and the trial court's credibility determination would be binding on this Court.[5] However, the testimony of Licensee and Trooper Wolfe is consistent about what Licensee said, or did not say, to the phlebotomist. The trial court's finding that Licensee informed the phlebotomist of her discomfort before she pulled the needle from her arm is not supported by any evidence.

In addition to the failed blood test, Licensee's conduct on the night in question also included an attempt to leave the hospital. Trooper Wolfe testified that he and Trooper Erdman "physically ran after her at one point." R.R. 22a.

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[5] In *Department of Transportation, Bureau of Traffic Safety v. O'Connell*, 521 Pa. 242, 555 A.2d 873 (1989), our Supreme Court clarified the appropriate standard for reviewing the trial court's credibility determinations, stating that:

> [q]uestions of credibility and conflicts in the evidence presented are for the trial court to resolve, not our appellate courts.... *As long as sufficient evidence exists in the record which is adequate to support the finding found by the trial court*, as factfinder, we are precluded from overturning that finding and must affirm, thereby paying the proper deference due to the factfinder who heard the witnesses testify and was in the sole position to observe the demeanor of the witnesses and assess their credibility.

Id. at 248, 555 A.2d at 875 (citations omitted) (emphasis added).

Licensee's actions at the hospital, viewed *in toto*, are certainly less than an unqualified, unequivocal assent to testing; thus, PennDOT met its burden of proving that Licensee refused through her conduct to submit to the requested test.

Once the Commonwealth met its *prima facie* burden of proof, the burden shifted to Licensee to prove by competent evidence that she was physically unable to take the test, or was not capable of making a knowing and conscious refusal. *Martinovic v. Department of Transportation, Bureau of Driver Licensing*, 881 A.2d 30, 34 (Pa. Cmwlth. 2005). To satisfy her burden in this regard, Licensee was required to produce competent medical evidence to prove that she was incapable of completing the blood test because no inability was apparent. *Larkin v. Commonwealth*, 531 A.2d 844, 846 (Pa. Cmwlth. 1987).

It appears that Licensee was prepared to present medical evidence on her ability to complete the blood test. At the hearing, her attorney stated that Dr. Joseph Acri would testify on behalf of Licensee that drawing blood from her would be highly difficult. R.R. 30a. However, the trial court sustained her appeal without hearing the testimony because it held that PennDOT did not make out a *prima facie* case.[6] Because we reverse the trial court on that initial determination,

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[6] The trial court found that the phlebotomist did not perform the test in a reasonable manner because Licensee felt pain and no blood was retrieved. This finding, which the trial court emphasized in its opinion, is not supported by any evidence. The record demonstrates that the blood test was performed by a trained phlebotomist in a hospital environment according to accepted medical practices, as required by *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, Justice Brennan set forth the constitutional standards that must be met in extracting blood alcohol evidence:

> Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or

(Footnote continued on the next page . . .)

it is necessary to remand this matter for further proceedings on Licensee's ability to complete the blood test.

For all of the foregoing reasons, the order of the trial court is reversed and the matter is remanded for further proceedings to determine if Licensee can present competent medical evidence to prove that she was incapable of completing the blood test.[7]

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MARY HANNAH LEAVITT, Judge

(continued . . .)

> in other than a medical environment – for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

Schmerber, at 771-72. Although the test at issue in the present case may not have resulted in a blood sample in the brief period of time that Licensee permitted the needle to remain in her arm, there is no indication that the test was performed in an unreasonable manner.

[7] Because we reverse the order of the trial court based on the first issue raised by PennDOT and especially in light of the trial court's misconstruction of Licensee's testimony, it is not necessary to address the second issue of whether the trial court erred in sustaining Licensee's appeal based solely on Licensee's testimony that she removed the needle due to extreme pain. There was no discrepancy between Licensee's and Trooper Wolfe's testimony that required the phlebotomist's clarification. Consequently, his testimony was not "critical," as the trial court opined. R.R. 85a.

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ORDER

AND NOW, this 14th day of October, 2008, the order of the Court of Common Pleas of Dauphin County dated February 27, 2008, in the above-captioned matter is hereby REVERSED and the matter is REMANDED for further proceedings in accordance with the attached opinion.

Jurisdiction relinquished.

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MARY HANNAH LEAVITT, Judge