IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jill Ann Sarvas,	:	
Appellant	:	
v.	:	No. 502 C.D. 2009
	:	
Commonwealth of Pennsylvania,	:	Submitted: January 8, 2010
Department of Transportation,	:	
Bureau of Driver Licensing	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: February 18, 2010

Jill Ann Sarvas appeals from the February 27, 2009, order of the Court of Common Pleas of Washington County (trial court) denying her appeal and reinstating the one year suspension of her operating privilege pursuant to Section 1547 of the Vehicle Code.[1] We affirm.

[1] 75 Pa.C.S. §1547. Section 1547 provides, in relevant part:

> (a) GENERAL RULE.-- Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle:

(Continued....)

By notice mailed December 6, 2007, Sarvas was informed by the Pennsylvania Department of Transportation (DOT) that her operating privilege was suspended for a period of one year effective January 10, 2008, pursuant to Section 1547 of the Vehicle Code due to her refusal to submit to a chemical test of her breath on November 23, 2007. Sarvas appealed the suspension to the trial court and a *de novo* hearing was held on December 1, 2008.

In support of her appeal, Sarvas testified on her own behalf and presented the testimony of a fact witness, John Larkin. DOT presented the testimony of Trooper George S. Carlberg, as well as documentary evidence. The parties stipulated that the only issue before the trial court was whether Sarvas made a knowing or conscious refusal when she failed to provide a sufficient breath

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> (1) in violation of section 1543(b)(1.1) (relating to driving while operating privilege is suspended or revoked), 3802 (relating to driving under influence of alcohol or controlled substance) or 3808(a)(2) (relating to illegally operating a motor vehicle not equipped with ignition interlock); or
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> (2) which was involved in an accident in which the operator or passenger of any vehicle involved or a pedestrian required treatment at a medical facility or was killed.
>
> (b) Suspension for refusal.—
>
> (1) If any person placed under arrest for a violation of section 3802 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 as follows:
>
> (i) Except as set forth in subparagraph (ii), for a period of 12 months.
>
> (ii) For a period of 18 months if any of the following apply:
>
> (A) The person's operating privileges have previously been suspended under this subsection.

sample when asked to submit to chemical testing. At the conclusion of the *de novo* hearing, the trial court granted Sarvas a continuance to take the deposition testimony of a medical expert. Thereafter, Sarvas submitted to the trial court the deposition testimony of Lawson F. Bernstein, Jr., M.D., a physician specializing in clinical and forensic psychiatry. Based on all the evidence presented, the trial court found as follows.

On November 23, 2007, Trooper Carlberg, a nine year veteran of the Pennsylvania State Police with extensive experience concerning DUIs, observed a sport utility vehicle pulled over on I-79 southbound with its four-way flashers activated. Trooper Carlberg found Sarvas at the wheel of the vehicle, whose breath emitted a strong odor of alcohol. After asking Sarvas where she was going, Sarvas first indicated Claysville and then Belle Vernon, which are in two opposite directions. Due to safety reasons, Trooper Carlberg did not conduct any field sobriety tests, but transported Sarvas to the state police barracks in Washington, Pennsylvania. The testimony indicated that Sarvas had called the Washington Hospital prior to Trooper Carlberg's arrival.

Upon first contact, Trooper Carlberg did not observe any breathing difficulties on the part of Sarvas, despite her complaints when he arrived. When it came time to provide a breathalyzer sample, Sarvas balked due to breathing difficulties; however, Trooper Carlberg testified that her labored breathing only appeared when he attempted to use the breathalyzer. He testified that: "At that point, she did have some shortness of breath. She did have labored breathing, but that only occurred when it appeared that she saw us looking at her."

Trooper Carlberg provided a ticket from the breathalyzer, an Intoxilyzer 5000, which read that there was an insufficient sample at 3:40 a.m.

The Intoxilyzer 5000 was properly calibrated when Sarvas provided an insufficient sample.

After initially denying medical attention, Sarvas indicated that she thought she was having a mini-stroke. Trooper Carlberg was only certified as a first responder; so at that point, EMS was contacted to transport Sarvas to the hospital. Washington Hospital was notified and Trooper Carlberg testified that the hospital was informed that the state police would be requesting medical blood from Sarvas. However, before arriving at the hospital, Trooper Carlberg was called to another incident and when he returned, Sarvas had already gone. Thus, no medical blood was drawn because Sarvas left without being seen. In fact, Sarvas established on cross-examination that she refused treatment at Washington Hospital.

The trial court found Trooper Carlberg's testimony to be entirely credible. The trial court determined that even if it found Sarvas' testimony credible, her statements regarding her alleged condition at the time of the breathalyzer were insufficient because she must provide competent medical evidence of her underlying breathing problems. The trial court found that the testimony of Sarvas' fact witness, John Larkin, likewise was insufficient because it was not competent medical evidence of her condition and he testified to an incident two years before in 2005, not the night in question.

The trial court found Dr. Bernstein's testimony lacking for various reasons including the fact that he did not examine Sarvas in person, but instead relied only on her past medical records and her record from her aborted hospital visit the night of the incident. The trial court stated that a review of Dr. Bernstein's deposition testimony revealed that he was not familiar with the breathalyzer used, the volume of air required for a sample, the number of samples

required, or the time to register a sufficient sample. The trial court found that while Dr. Bernstein opined that Sarvas could not provide four seconds of breath, that opinion was immaterial in light of his unfamiliarity with the Intoxilyzer 5000. The trial court found that since Dr. Bernstein failed to familiarize himself with the Intoxilyzer 5000, his opinion was meaningless; therefore, Sarvas could not avail herself of his opinion.

Accordingly, the trial court concluded that it was ultimately irrelevant that Sarvas informed Trooper Carlberg of her alleged breathing problems because she failed to produce competent medical evidence to support her appeal. As such, the trial court denied Sarvas' appeal by order of February 27, 2009. Thereafter, Sarvas filed a "Motion Requesting Hearing Date to Reconsider Statutory Appeal" with the trial court. By order of March 9, 2009, the trial court ordered that a hearing be held on April 29, 2009, for "Reconsideration of the Statutory Appeal." On March 26, 2009, Sarvas filed a notice of appeal from the trial court's February 27, 2009, order. On April 14, 2009, Sarvas filed a "Motion to Stay Proceedings" with the trial court. On that same date, the trial court denied Sarvas' Motion to Stay Proceedings but granted, if necessary, Sarvas twenty-one days from the trial court's decision in the pending reconsideration of the statutory appeal to file a Pa.R.A.P. 1925(b) statement.

On April 13, 2009, Sarvas filed a "Motion to Stay Proceedings" with this Court on the basis that the hearing for reconsideration of her statutory appeal was scheduled for April 29, 2009. Sarvas requested that this Court stay this appeal pending the decision of the trial court following the April 29, 2009, hearing.

By order of April 14, 2009, this Court denied Sarvas' motion and vacated the trial court's March 9, 2009, order. Specifically, we stated that "it appears that the trial court did not "expressly grant" reconsideration within 30 days

of its February 27, 2009, order and thus lost jurisdiction to consider it, see Pa.R.A.P. 1701(b)(3); Shapiro v. Center Township, 632 A.2d 994 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 537 Pa. 635, 642 A.2d 488 (1994) (an order scheduling argument on a petition for reconsideration does not constitute an order expressly granting reconsideration)."[2]

Herein, Sarvas raises the following issues for our review:[3]

> 1. Whether the trial court, by its March 9, 2009, order, timely and properly granted reconsideration of its February 27, 2009, order under Pa.R.A.P. 1701(b)(3);
>
> 2. Whether the trial court's decision is supported by substantial evidence because Sarvas timely and appropriately notified the state police that she was suffering from a condition that rendered her unable to provide a sufficient air sample for a breathalyzer test; and
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> 3. Whether the trial court's decision is against the weight of the evidence because the great weight of the evidence showed that Sarvas timely and appropriately notified the state police that she was suffering from a condition that

[2] We note that Sarvas filed an "Application for Relief for Remand of Case" with this Court on May 15, 2009, requesting that this matter be remanded to the trial court to carry out the intended and expected reconsideration of her statutory appeal as it was highly probable that the trial court would dispose of this matter in such a manner that Sarvas would no longer wish to appeal or would discontinue the existing appeal before this Court. After reviewing Sarvas' motion, the answer thereto, and the trial court's Pa.R.A.P. 1925(a) opinion, we denied Sarvas' request for remand by order of May 27, 2009. After granting both parties two extensions to file their respective briefs, this appeal is now ready for disposition.

[3] Our scope of review in an operating privilege suspension case is confined 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. Department of Transportation, Bureau of Driver Licensing v. Ingram, 538 Pa. 236, 648 A.2d 285 (1994). Questions of credibility and conflicts in the evidence presented 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 it as fact finder and affirm. Id.

> rendered her unable to provide a sufficient air sample for a breathalyzer test.

The first issue raised by Sarvas in this appeal is without merit. We have already disposed of this issue in our April 14, 2009, order by denying Sarvas' motion to stay proceedings and in our May 27, 2009, order denying her request for a remand. As such, we will not revisit this issue any further.

In support of her appeal, Sarvas argues that the trial court's determination that she made a knowing and conscious refusal to submit to the breathalyzer test is not supported by substantial evidence and is against the weight of the evidence. Sarvas contends that she tried to the best of her ability to provide sufficient samples but due to her condition she was unable to do so; consequently, she did not refuse to submit to the breathalyzer. Sarvas argues further that her uncontradicted medical testimony was competent and unequivocal and clearly shows she was physically unable to submit to a breath test; therefore, she could not have made a knowing and conscious refusal.

Sarvas contends that she gave adequate notice to the officer of her inability to take a breathalyzer test in order for Trooper Carlberg to seek a viable alternate chemical test. Sarvas argues that, while the officer made haphazard arrangements with the hospital for a blood test to be done, he never informed Sarvas of the arrangement; therefore, her departure from the hospital is not a sign of uncooperativeness. Finally, Sarvas argues that DOT's witness, Trooper Carlberg, was evasive and less than forthright on when and if he saw signs of respiratory distress. Sarvas contends that his testimony is a very weak counter-weight to Sarvas' testimony, the documentary evidence, and Dr. Bernstein's testimony.

This Court has previously explained that "the determination of whether a licensee's refusal was knowing and conscious is a question of fact" for the trial court and is not reviewable on appeal. Dailey v. Department of Transportation, Bureau of Driver Licensing, 722 A.2d 772, 774 (Pa. Cmwlth. 1999). This Court has also explained, however, that "whether there is substantial competent evidence to support the trial court's factual determination in this regard is a question of law" subject to this Court's review. Id.

It is the licensee's burden to introduce evidence that alcohol played no part in these type of cases once the DOT had proved, as it did here, that she was arrested for driving under the influence, that she was requested to submit to a chemical test, that she refused to submit, and that she was given the appropriate warnings regarding the consequences of her refusal.[4] Id. A licensee's "self-serving testimony that she was incapable of providing a knowing and conscious consent to or refusal of a chemical test is not sufficient to meet her burden of proof, and expert medical testimony, although not a *per se* requirement, is generally required in order to validate [her] testimony." Ostermeyer v. Department of Transportation, Bureau of Driver Licensing, 703 A.2d 1075, 1077 (Pa. Cmwlth. 1997); see also Lemon v. Department of Transportation, Bureau of Driver Licensing, 763 A.2d 534 (Pa. Cmwlth. 2000) (where licensee suffers from a medical condition that affects her ability to perform the test, and that condition is not obvious, it must be established by competent medical evidence). However, if a medical expert cannot rule out alcohol as a contributing factor in the licensee's inability to make a knowing and conscious refusal of chemical testing, the

[4] Sarvas does not argue that DOT did not meet this burden of proof.

affirmative defense fails. DiGiovanni v. Department of Transportation, Bureau of Driver Licensing, 717 A.2d 1125 (Pa. Cmwlth. 1998).

Herein, Sarvas is essentially asking this Court to reinterpret and weigh the evidence in her favor. However, it is not within our scope of review to engage in a reinterpretation of the evidence. As noted herein, questions of credibility and conflicts of evidence in license suspension cases are for the trial court to resolve. Ingram.

The trial court accepted Trooper Carlberg's testimony as entirely credible that although Sarvas told him she had a pre-existing medical condition, he did not observe any symptoms himself. The trial court accepted Trooper Carlberg's testimony that he called for emergency medical services out of an abundance of caution because he was more comfortable deferring to medical professionals. Therefore, the trial court rejected Sarvas' self-serving testimony that she had a pre-existing medical condition which prevented her from completing the breathalyzer test. It is well settled that the trial court, as fact finder, is free to accept or reject the testimony of any witness in whole or in part. DiCola v. Department of Transportation, Bureau of Driver Licensing, 694 A.2d 398 (Pa. Cmwlth. 1997).

The trial court found further that the testimony of Sarvas' medical expert was lacking for several reasons including the expert's unfamiliarity with the Intoxilyzer 5000, particularly the volume of air required for a sample, the number of samples required or the time to register a sufficient sample. The record reflects that Dr. Bernstein testified on direct examination that he was familiar with the intoxilyzer test used in Sarvas' case and the volume or type of breath necessary for the breathalyzer device to work properly. Reproduced Record (R.R.) at 82a. However, he testified on cross-examination that he did not know which version of

the Intoxilyzer 5000 was used on November 22, 2007, when Sarvas attempted to submit to a breathalyzer test. Id. at 87a. Dr. Bernstein's testimony reveals that he did not know: (1) the volume of air necessary for a valid breathalyzer test; (2) how many samples were necessary for a valid breathalyzer test in the Commonwealth of Pennsylvania; and (3) how many seconds a person must blow into the Intoxilyzer machine in order to get a valid sample. Id. at 92a-93a.

This Court has previously held that where a physician is unaware of what is required of a licensee in order to satisfy the requirements of a breathalyzer test, the physician's testimony that the licensee was physically unable to perform the test is not competent. Whistler v. Department of Transportation, Bureau of Driver Licensing, 882 A.2d 537, 541 (Pa. Cmwlth.), petition for allowance of appeal denied, 586 Pa. 752, 892 A.2d 825 (2005); Bridges v. Department of Transportation, Bureau of Driver Licensing, 752 A.2d 456 (Pa. Cmwlth. 2000). Accordingly, the trial court properly found that Sarvas' failed to provide competent medical evidence that her underlying breathing problems caused her inability to perform the breathalyzer test.

Moreover, Sarvas admitted that she had been drinking alcohol on November 22, 2007. However, Dr. Bernstein did not unequivocally testify that alcohol was not a contributing factor in Sarvas' alleged inability to complete the breathalyzer test. Dr. Bernstein testified that he did not know the amount of alcohol in Sarvas' system on November 22, 2007. R.R. at 88a; 93a. When specifically asked if he could rule out alcohol as a contributing factor to the way Sarvas was acting on November 22, 2007, Dr. Bernstein simply replied that he did not know if she had anything to drink that night. Id. at 94a. As such, Sarvas failed

to present any testimony or evidence to establish that her alcohol consumption did not contribute to her alleged inability to make a knowing and conscious refusal.

The trial court's order is affirmed.

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JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 18th day of February, 2010, the February 27, 2009, order of the Court of Common Pleas of Washington County entered in the above-captioned matter is affirmed.

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JAMES R. KELLEY, Senior Judge