

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gerard Kozic, :
Appellant :
v. :
Commonwealth of Pennsylvania, :
Department of Transportation, Bureau: No. 520 C.D. 2011 :
of Driver Licensing : Submitted: August 19, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: September 13, 2011

Gerard Kozic (Licensee) appeals *pro se* from an order of the Court of Common Pleas of Monroe County (trial court) denying his appeal of a one-year license suspension imposed by the Pennsylvania Department of Transportation, Bureau of Driver Licensing (Department) pursuant to Section 3804(e) of the Vehicle Code (Code)¹ relating to driving under the influence. Finding no error in the trial court’s decision, we affirm.

¹ 75 Pa. C.S. §3804(e). That section provides, in pertinent part, as follows:

(e) Suspension of operating privileges upon conviction.--

(1) The department shall suspend the operating privilege of an individual under paragraph (2) upon receiving a certified record

(Footnote continued on next page...)

The facts of this case are not in dispute. On March 5, 2002, Licensee violated former Section 3731 of the Code relating to driving under the influence (DUI) of alcohol or a controlled substance. He was accepted into and completed the accelerated rehabilitative disposition (ARD) program for this violation. In early 2007, the New Jersey Motor Vehicle Commission (Commission) reported to the Department that Licensee was convicted of violating Section 39:4-50(a) of the New Jersey Motor Vehicle and Traffic Laws² relating to driving while intoxicated

(continued...)

of the individual's conviction of or an adjudication of delinquency for:

(i) an offense under section 3802; or

(ii) an offense which is substantially similar to an offense enumerated in section 3802 reported to the department under Article III of the compact in section 1581 (relating to Driver's License Compact).

(2) Suspension under paragraph (1) shall be in accordance with the following:

(i) Except as provided for in subparagraph (iii), 12 months for an ungraded misdemeanor or misdemeanor of the second degree under this chapter.

² N.J.S.A. §39:4-50(a). This section outlines the offense of driving while intoxicated as:

[A] person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood.

(DWI). The Department sent Licensee an official notice with a mail date of April 17, 2007, stating that it was imposing a one-year suspension of Licensee's operating privilege in conformity with the requirements of Section 3804(e) of the Code as a consequence of this DWI violation. While the suspension notice advised Licensee of his right to appeal the Department's action within 30 days of the notice's mail date, Licensee did not appeal the suspension. In June 2007, after the time period for appeal of his Pennsylvania license suspension had expired, Licensee appealed his New Jersey conviction for DWI, his license suspension was stayed in New Jersey, and the conviction was eventually overturned. The Commission notified the Department that Licensee's sentence was stayed on appeal and that his DWI conviction was sent to the Commonwealth in error. However, the Department notified Licensee that because he had not appealed his license suspension within the permitted time frame, the Department could not take any further action to modify its previous decision. Licensee fully served this one-year suspension.

In 2010, the Commission reported to the Department that Licensee had again been convicted of DWI. Therefore, the Department sent Licensee an official notice with a mail date of July 15, 2010, stating that it was imposing another one-year suspension of his operating privilege pursuant to Section 3804(e)(2)(i) of the Code. Licensee timely appealed this third suspension to the trial court.

At the trial court hearing, the Department entered into evidence its official notice of suspension and then rested. Licensee did not challenge the validity of the current suspension; rather, he argued that because his first New Jersey conviction for DWI was reported to the Commonwealth in error and was

eventually overturned, he should not have to serve the current suspension. In effect, Licensee argued that the trial court should grant him equitable relief and credit the license suspension he served in connection with the first New Jersey DWI charge toward his most recent DWI conviction. The trial court denied Licensee's appeal stating that according to our decision in *Department of Transportation, Bureau of Traffic Safety v. Yarbinitz*, 508 A.2d 641 (Pa. Cmwlth. 1986), courts of common pleas did not have the authority to compute or give credit for "time served" on a license suspension. This appeal followed.³

On appeal, Licensee argues that the trial court erred in affirming the Department's most recent suspension of his driving privilege because the suspension he erroneously served in 2007 should have been applied toward his most recent DWI conviction. However, the trial court correctly held that it was without authority to grant Licensee such a set-off or credit. We directly addressed this issue in *Yarbinitz*, stating:

Even assuming [Licensee] was entitled to credit, this is *not* a basis for sustaining the appeal. If the person whose license is suspended committed the offense, and if the offense is a valid basis for suspension and no violation of due process has occurred, then the suspension must be upheld and the operator's appeal dismissed. The trial court can do no more.

³ Our scope of review is limited to determining whether the trial court committed an error of law or an abuse of discretion, and whether the trial court's findings are supported by substantial evidence. *Gregro v. Department of Transportation, Bureau of Driver Licensing*, 987 A.2d 1264 (Pa. Cmwlth. 2010).

508 A.2d at 642. In the present case, Licensee failed to challenge either of the two issues which were before the trial court – the underlying grounds for which his license was suspended, meaning the present DWI, or that he was the accused party. Therefore, the trial court had no choice but to uphold the suspension and dismiss Licensee’s appeal. *See also Xenakis v. Department of Transportation, Bureau of Driver Licensing*, 702 A.2d 572, 575 (Pa. Cmwlth. 1997) (stating “[t]he trial court may not credit a licensee’s suspension for time served because [the Department] is better able to determine issues of credit, and its determinations are ultimately appealable to this Court”); *Department of Transportation, Bureau of Driver Licensing v. Lapinsky*, 548 A.2d 382 (Pa. Cmwlth. 1988). As the Department points out, Licensee is not without recourse as he may still seek administrative credit for his previous operating privilege suspension pursuant to 67 Pa. Code §491.4(d)(1)(iv). *See also Xenakis; Lapinsky; Yarbinitz.*

While Licensee also argues in his brief to this Court that he was denied due process, he failed to raise this issue before the trial court; therefore, it is waived.⁴

⁴ Even if we were to address this issue, we would find that the official notice of suspension the Department sent regarding Licensee’s first New Jersey DWI charge met all of the due process requirements: it advised Licensee that his suspension would be for a period of one year; that the suspension was being imposed based upon a New Jersey conviction on October 11, 2006, for an offense that occurred on August 13, 2006; and that the suspension was being imposed pursuant to Section 3804(e)(2)(i) of the Code. *See Harrington v. Department of Transportation, Bureau of Driver Licensing*, 763 A.2d 386 (Pa. Cmwlth. 2000). Finally, the notice clearly advised Licensee how, when and where to file a timely appeal of his suspension, yet he failed to do so.

Accordingly, the order of the trial court is affirmed.

DAN PELLEGRINI, Judge

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ORDER

AND NOW, this 13th day of September, 2011, the order of the Court of Common Pleas of Monroe County, dated March 3, 2011, is affirmed.

DAN PELLEGRINI, Judge