

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian M. Pieton,	:	
	:	
Appellant	:	
	:	
	:	
v.	:	No. 576 C.D. 2010
	:	Submitted: September 10, 2010
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
	:	
	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY

FILED: November 19, 2010

Brian Pieton (Pieton) appeals from an order of the Court of Common Pleas of Cumberland County (trial court) which dismissed his statutory appeal from a one-year suspension of his operating privilege imposed by the Department of Transportation, Bureau of Driver Licensing (Department) pursuant to 75 Pa. C.S. § 1547, as a result of his refusal to submit to chemical testing. We quash the appeal.

On October 14, 2009, the Department informed Pieton that his license would be suspended for one year for his refusal to submit to chemical testing on November 18, 2009. Pieton appealed the suspension to the trial court which conducted a hearing. At the hearing, Trooper

Roussell testified that he arrested Pieton for driving under the influence of alcohol and transported him to the Cumberland County Booking Center for a breath test.

Officer Spahr (Spahr) administered the breath test to Pieton. According to Spahr, Pieton did not provide a constant breath sample, that such was intentional and that his failure to provide a sufficient breath sample was deemed a refusal. The trial court also viewed a DVD of Pieton's processing. Pieton did not testify.

On March 2, 2010, the trial court dismissed Pieton's appeal and affirmed the suspension imposed by the Department for his refusal to submit to chemical testing. On May 27, 2010, the trial court issued an opinion in support of its order. Therein, the trial court observed that:

On April 20, 2010, we filed an order directing the appellant [Pieton] to file a Statement of Matters Complained of on Appeal with the direction that the statement be served on the hearing judge. We have learned that a Statement of Matters Complained of on Appeal was filed on or about May 11, 2010. However, the statement was not served upon the undersigned.¹ We are satisfied that the Commonwealth Court would be within its rights to quash this appeal because it was not served upon the trial court. *See Commonwealth v. \$766.00 U.S. Currency*, 948 A.2d 912 (Pa. Cmwlth. 2008).

(Trial court opinion at 1.)

We agree with the trial court that Pieton has waived all of his issues by failing to serve on the trial court a copy of his statement of matters

¹ We did not receive a copy of it. The affidavit of service attached to the 1925(b) statement indicates that a copy of it was served upon the Office of Chief Counsel for the Department of Transportation. There is no reference to service on the hearing judge.

complained of on appeal and that the appeal must be quashed. Pa. R.A.P. 1925 provides, in part, that a trial court judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of matters complained of on appeal. The rule further provides that the order directing the filing and service of a statement shall specify that the statement shall be served on the trial court judge and the order shall state that any issue not properly included in the statement shall be deemed waived. Pa. R.A.P. 1925(b)(3).²

² Pa. R.A.P. 1925(b) provides in pertinent part:

(b) Direction to file statement of errors complained of on appeal; instructions to the appellant and the trial court.--If the judge entering the order giving rise to the notice of appeal (“judge”) desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of matters complained of on appeal (“Statement”).

(1) Filing and service.--Appellant shall file of record the Statement and concurrently shall serve the judge.

(3) Contents of order.--The judge’s order directing the filing and service of a Statement shall specify:

(i) the number of days after the date of entry of the judge’s order within which the appellant must file and serve the Statement;

(ii) that the Statement shall be filed of record;

(iii) that the Statement shall be served on the judge pursuant to paragraph (b)(1);

(iv) that any issue not properly included in the Statement timely filed and served pursuant to subdivision (b) shall be deemed waived.

Here, the trial court's April 20, 2010 order adhered to the language of Pa. R.A.P. 1925, in that it directed Pieton to file a concise statement of matters complained of on appeal, directed that such statement be filed and served on the trial court judge and also stated that any issue not included in the statement would be deemed waived. (R.R. at 64a.) "[F]ailure to serve a 1925(b) statement on the trial court judge constitutes a fatal defect which shall result in the issues being waived and the appeal being quashed." Commonwealth v. \$766.00, 948 A.2d at 915. Accordingly, having failed to comply with the requirements of Pa. R.A.P. 1925(b), the appeal filed by Pieton is quashed.

Next, we address the Department's contention that it is entitled to an award of counsel fees and costs pursuant to Pa. R.A.P. 2744. With respect to the merits of the case, the Department maintains that Pieton's appeal is frivolous in that it lacks any reasonable basis in either law or fact. Specifically, the Department maintains that on appeal, Pieton merely attacks the trial court's credibility determinations, wherein the trial court credited the testimony of the Department's witnesses that Pieton intentionally provided an insufficient breath sample and "credibility determinations cannot be disturbed on appeal if they are supported by substantial evidence." Department of Transportation, Bureau of Driver Licensing v. Gaertner, 589 A.2d 272, 276 (Pa. Cmwlth. 1991).

We conclude, however, that an award of counsel fees and costs is not warranted. In his appeal, Pieton also addresses the difference between an "invalid sample" and a "deficient sample" of breath and whether the Department met its burden of proof in accordance with Department of

Transportation, Bureau of Driver Licensing v. Valania, 695 A.2d 953 (Pa. Cmwlth. 1997). Although this court does not reach the merits of Pieton's appeal, we conclude that such has a reasonable basis in law or fact.

In accordance with the above, the appeal filed by Pieton is quashed.

JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian M. Pieton,

Appellant

v.

Commonwealth of Pennsylvania,
Department of Transportation,
Bureau of Driver Licensing,

:
:
:
:
:
:
:
:
:
:
:
:
:
:
:
:

No. 576 C.D. 2010

ORDER

Now, November 19, 2010, the above-captioned appeal is
quashed.

JIM FLAHERTY, Senior Judge