

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Mitchell James Kalina | : | |
| | : | |
| v. | : | No. 67 C.D. 2007 |
| | : | |
| Commonwealth of Pennsylvania, | : | Submitted: June 1, 2007 |
| Department of Transportation, | : | |
| Bureau of Driver Licensing, | : | |
| Appellant | : | |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION BY JUDGE SIMPSON¹ FILED: July 20, 2007

The Department of Transportation, Bureau of Driver Licensing (Department) appeals an order of the Somerset County Common Pleas Court (trial court) granting the statutory appeal of a license suspension filed by Mitchell James Kalina (Licensee). Department argues a nolle pros of an underlying criminal charge does not constitute a final determination as to eliminate a license suspension, and therefore the nolle pros does not constitute sufficient evidence to rebut the Department’s certified records. We reject this argument and affirm.

In October 2004, Licensee was cited for underage drinking. A Magisterial District Judge (MDJ) convicted Licensee on that summary charge. Consequently, the Administrative Office of Pennsylvania Courts electronically certified Licensee’s conviction to Department. Upon receipt of Licensee’s conviction, Department suspended Licensee’s operating privilege for 90 days

¹ This was reassigned to the author on June 1, 2007.

pursuant to 75 Pa. C.S. §1532(d)(1) (requiring the suspension of operating privilege where licensee is convicted of violating 18 Pa. C.S. §6308). In April 2005, Department reinstated Licensee's operating privilege.

In December 2005, however, a MDJ convicted Licensee of a second underage drinking violation. As a result of this conviction, Department suspended Licensee's operating privilege for one year pursuant to 75 Pa. C.S. §1532(d)(2) (relating to a second offense for underage drinking).

Licensee appealed the second conviction. At a de novo hearing, the trial court nolle prossed the second underage drinking charge.²

Licensee also timely filed a statutory appeal of Department's one-year suspension. The trial court conducted a hearing with respect to the license suspension, where Department produced the MDJ's certified conviction. Licensee did not produce a copy of the trial court's nolle pros order on the underlying criminal charge; however, the trial court took judicial notice of the order and directed "the prothonotary's deputy to make a copy of the [nolle pros] order and place [it] in the docket for the civil file on the license suspension appeal." Reproduced Record (R.R.) at 22a. The court ultimately sustained the statutory appeal, and Department appealed.

² More specifically, the trial court granted the Commonwealth's motion to amend the citation to add a violation of 18 Pa. C.S. §5503 (relating to disorderly conduct). Pursuant to a plea agreement, the court nolle prossed the underage drinking charge.

The trial court subsequently rendered an opinion in support of its license suspension appeal determination. It noted that when a person appeals a guilty plea or conviction by an issuing authority, the trial court conducts a de novo review. Such review requires the court hearing the evidence to decide the case anew. Inasmuch as the Commonwealth withdrew the underage drinking charge, there were no charges pending before the trial court on which to render judgment. The trial court concluded a nolle pros is not the same as a conviction, and, therefore, sustained Licensee's appeal.

On appeal to this Court,³ Department argues a nolle pros of the underage drinking charge does not constitute a final determination in Licensee's favor so as to eliminate the suspension imposed upon the MDJ's conviction. Since a nolle pros order is not a final disposition, Department contends it cannot constitute clear and convincing evidence sufficient to rebut the presumption of correctness of Department's certified documents. In addition, pursuant to Pa. R.Crim. P. 462, relating to summary appeal convictions, Department maintains the trial court erred in disposing of the charge.

Initially, we note, the burden of proof is on Department to produce a record of conviction which supports the suspension. Passel v. Dep't of Transp., Bureau of Driver Licensing, ___ A.2d. ___ (Pa. Cmwlth., No. 2131 C.D. 2006, filed June 8, 2007). The burden shifts to the licensee to rebut the inference drawn

³ Our review in a license suspension case is limited to determining whether the trial court's findings of fact were supported by substantial evidence, whether errors of law were committed, or whether the trial court committed a manifest abuse of discretion. Stair v. Dep't of Transp., Bureau of Driver Licensing, 911 A.2d 1014 (Pa. Cmwlth. 2006).

from these records with clear and convincing evidence. Id. Clearly, Department met its initial burden.

Recently in Passel, this Court rejected the arguments Department raises here. There, a MDJ convicted a licensee of a summary offense relating to disregard of railroad barriers. Because of this conviction, Department suspended the licensee's operating privilege. On summary appeal, the Commonwealth nolle prossed the underlying criminal charge. The licensee then filed a timely statutory appeal of his license suspension, arguing Department could not impose a license suspension based on a conviction on a charge that was ultimately withdrawn. We agreed with the licensee, holding:

At the hearing before [common pleas], the charge of violating 75 Pa. C.S. §3441(b)(1) was [nolle] prossed and thus [the licensee] was never convicted of the violation. Department nonetheless argues that a [nolle] pros ... does not constitute a final determination in the [licensee's] favor so as to eliminate the suspension imposed based upon the MDJ's conviction. Department states that a nolle prosequi is a voluntary withdrawal by a prosecuting attorney of proceedings in a particular criminal bill or information While Department's statement is true, it is also true that a nolle prosequi acts neither as an acquittal nor a conviction. As such, because the ... charge was [nolle] prossed at the de novo hearing, [the licensee] met his burden of proving that he was not convicted of that charge.

Department also argues that according to Pa. R.Crim. P. 462, with respect to a summary appeal conviction, the trial court hearing the case de novo may only: dismiss the charge pursuant to Pa. R.Crim. P. 462(C) if the arresting police officer does not appear; dismiss the appeal pursuant to Pa. R.Crim. P. 462(D) or (E) and enter judgment based upon the MDJ's judgment of sentence if

[the licensee] either failed to appear for trial or withdrew his appeal; or following a plea or hearing de novo, enter a verdict of guilty or not guilty pursuant to Pa. R.Crim. P. 462(F). As Department states, however, the hearing before the trial court is de novo. Thus, if the charge is [nolle] prossed, as it was here, then there are no charges for the trial court to dispose of.

Passel, at 2 (citations omitted).

Applying Passel here, we similarly reject Department's arguments. The MDJ convicted Licensee for a second underage drinking violation. Department neither disputes the Commonwealth nolle prossed this charge nor that the trial court took judicial notice of its nolle pros order. See R.R. at 22a. Thus, Licensee rebutted the MDJ's certified conviction.

The Commonwealth has the authority to control the prosecution once the summary appeal is filed. See Pa.R.Crim.P. 462(B). Further, the trial court may accept the Commonwealth's motion for nolle pros. Pa.R.Crim.P. 585. Thus, the conduct of the prosecution before the trial court was specifically authorized by the applicable rules of procedure, and the trial court did not improperly dispose of any charges. Based on the foregoing, no error is apparent. The trial court is affirmed.

ROBERT SIMPSON, Judge

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ORDER

AND NOW, this 20th day of July, 2007, the order of the Somerset County Common Pleas Court is **AFFIRMED**.

ROBERT SIMPSON, Judge