

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Reginald Andre Miller	:
	:
v.	:
	:
Commonwealth of Pennsylvania,	:
Department of Transportation,	:
Bureau of Driver Licensing,	: No. 864 C.D. 2007
Appellant	: Submitted: November 30, 2007

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge *
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY SENIOR JUDGE COLINS**

FILED: January 18, 2008

The Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (Department) appeals an order of the Court of Common Pleas of Philadelphia County that sustained a statutory appeal to that court from the Bureau's imposition of a one-year suspension of the operating privileges of Reginald Miller (Licensee) for allegedly refusing to submit to chemical testing¹ in connection with Licensee's arrest for violating Section 3802 of the Vehicle Code, 75 Pa. C.S. §3802, which prohibits driving under the influence of alcohol or controlled substances.

¹ Section 1547(b)(1)(i) of the Vehicle Code, 75 Pa. C.S. §1547(b)(1)(i) provides for such suspensions when a driver fails to submit to chemical testing.

*The decision in this case was reached after the date that Judge Colins assumed the status of senior judge.

The trial court made the following factual determinations. Officer David DeCrosta of the Philadelphia Police Department stopped Licensee on September 30, 2006, after observing Licensee driving his automobile on Spring Garden Street in Philadelphia. After conversing with and observing Licensee, Officer DeCrosta arrested Licensee for possibly driving under the influence of alcohol or a controlled substance. At the police detention center, Officer Henry Gehring, who was assigned breathalyzer operation duties at that time, met with Licensee, read Implied Consent warnings to Licensee, and requested that Licensee submit to a breathalyzer test. Licensee then requested to speak with a supervisor. Officer Gehring told Licensee that he could speak with a supervisor only after he submitted to the testing, and recorded Licensee's response as a refusal.

The trial court found credible the testimony of both Licensee and Officer Gehring, and determined that Licensee's recitation of facts concerning an alleged assault he experienced earlier in the evening constituted justification for his requesting to speak with a supervisor before submitting to the breathalyzer. The trial court, citing *Jacobs v. Department of Transportation, Bureau of Driver Licensing*, 695 A.2d 956 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 549 Pa. 705, 700 A.2d 443 (1997), concluded that, because of the circumstances preceding Licensee's arrest --- his assault --- he could not make a knowing or conscious refusal.

In this appeal,² the Department raises the following issues: (1) Whether the trial court erred in concluding that Licensee did not refuse to submit

² This Court's standard of review of trial court's order sustaining a statutory appeal of a license suspension is limited to considering whether the trial court committed an error of law and whether the trial court's determinations indicated that an abuse of discretion has occurred. *Kachurak v. Department of Transportation, Bureau of Driver Licensing*, 913 A.2d 982 (Pa. Cmwlth. 2006).

to chemical testing in violation of Section 1547 of the Vehicle Code; and (2) Whether the trial court erred in concluding that Licensee established that he was incapable of making a knowing and conscious decision to refuse the testing.³

As the Department notes, when a law enforcement officer requests a licensee to submit to testing, any response other than an unequivocal assent will constitute a refusal. *Finney v. Department of Transportation, Bureau of Driver Licensing*, 721 A.2d 420 (Pa. Cmwlth. 1998). As stated in one of the cases upon which the Department relies, *Department of Transportation, Bureau of Traffic Safety v. Ferrara*, 493 A.2d 154 (Pa. Cmwlth. 1985), police officers requesting submission for testing should not be required to spend time trying to convince a licensee to submit to testing or waiting for the above-mentioned unequivocal assent.

As the Department notes, and the trial court did not apparently disagree, in this case Officer Gehring provided the required Implied Consent warnings, including a statement that, if Licensee asked to speak with anyone when asked to submit, his response would be regarded as a refusal. There appears to be no argument or concern that Officer Gehring's administration of the Implied Consent warnings was erroneous in any way.

However, the key issue in this case concerns the trial court's conclusion that the assault Licensee experienced earlier in the evening supports a conclusion that he could not make a knowing and conscious consent to the request for testing. As the trial court noted, once the Department satisfied its burden to show that Licensee refused, the burden shifted to Licensee to establish that (1) he was not physically capable of completing the test or (2) that the refusal was not

³ We note that this Court issued an order precluding Licensee from submitting a brief.

knowing or conscious. *Martinovic v. Department of Transportation, Bureau of Driver Licensing*, 881 A.2d 30, 34 (Pa. Cmwlth. 2005).

We agree with the Department that Licensee's testimony includes no support for a conclusion that he was confused or that he had sustained some physical impairment that would prevent him from knowingly or consciously consenting to the test. There is simply no sufficient evidence from which to draw that conclusion. Accordingly, we will reverse the trial court's order, and direct that the one-year suspension of Licensee's driving privileges be reinstated.

JAMES GARDNER COLINS, Senior Judge

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ORDER

AND NOW, this 18th day of January 2008, the order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is reversed, and the one-year suspension of Licensee's driving privileges is reinstated.

JAMES GARDNER COLINS, Senior Judge