

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lynn Marie Fortebuono :
 :
 v. : No. 98 C.D. 2011
 :
 : Submitted: June 17, 2011
 Commonwealth of Pennsylvania, :
 Department of Transportation, :
 Bureau of Driver Licensing, :
 Appellant :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE PATRICIA A. McCULLOUGH, Judge
 HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: December 6, 2011

The Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (DOT) appeals from the December 9, 2010, order of the Court of Common Pleas of Northampton County (trial court) sustaining Lynn Marie Fortebuono's (Licensee) appeal of the eighteen-month suspension of her operating privilege imposed by DOT pursuant to section 1547(b)(1)(ii) of the Vehicle Code.¹ We reverse.

¹ 75 Pa. C.S. §1547(b)(1)(ii). This section of the Vehicle Code, popularly known as the "Implied Consent Law," requires DOT to suspend for eighteen months the operating privilege of any person whose operating privilege has previously been suspended under this subsection, who has been arrested driving under the influence of alcohol or controlled substance, and refuses a police officer's request to submit to chemical testing.

On March 17, 2010, Licensee was arrested for operating a motor vehicle under the influence of alcohol, taken to a DUI center, and asked to submit to a chemical blood test. The entire encounter between Licensee, the phlebotomist, and the police officer present at the DUI center was recorded onto a DVD. The events recorded on the DVD may be summarized as follows:

Although Licensee initially appears to be cooperative and to give her consent, she immediately tells the phlebotomist: “You’ve got one chance to stick me. That’s it. One chance.” (DVD at 22:41:46.) The phlebotomist attempts but is unable to draw blood from Licensee’s right arm, and she informs the police officer that the vein “collapsed.” (DVD at 22:42:52.) At that point, Licensee states that a pediatric needle might be needed because she has unusually small veins. (DVD at 22:43:00; 22:44:00.) The DUI center is not equipped with pediatric needles, (DVD at 22:43:03), and the police officer calls for back-up to take her to the hospital. (DVD at 22:44:55.) At this point, Licensee’s demeanor changes drastically; she begins cursing and shouts: “Oh no, I’m not going to the hospitalyou’re not . . . wasting my time. I’ll lose my license for a year.” (DVD at 22:44:57.)

The police officer informs Licensee that if her blood cannot be obtained at the DUI center, the policy is to take her to the hospital. (DVD at 22:45:35.) Licensee continues to yell profanities, refuses to be taken to the hospital, and says that she works at the hospital and cannot go there.² (DVD at 22:45:47.)

Although she had previously told the phlebotomist that she only had “one chance,” Licensee, yelling and cursing, insists that the phlebotomist try again in her other arm. (DVD at 22:47:00.) After some hesitation, the phlebotomist agrees to examine Licensee’s left arm, (DVD at 22:48:28), and Licensee begins arguing and

² Licensee testified that she used to work in “registration” at Easton Hospital, but, at the time of the incident, worked for two surgeons who do surgeries at Easton Hospital. (N.T. at 23-24.)

using profanity with the phlebotomist even as she examines Licensee's arm. (DVD 22:49:00.) Unable to find a vein on Licensee's left arm, the phlebotomist indicates that she is done. (DVD at 22:50:00.) The officer then advises Licensee that if she does not go to the hospital, he will consider it a refusal. Licensee says "No, it's a refusal." (DVD at 22:50:26.) At this point, Licensee becomes increasingly antagonistic and abusive to the phlebotomist,³ cursing at her and calling her names like "stonehead" (DVD at 22:55:42); "scumbag" (DVD at 22:57:40); and "trailer park trash" (DVD at 23:03:30). Licensee ridicules the phlebotomist's teeth (DVD at 22:50:32; 22:51:40; 22:56:36; 22:57:37), clothing (DVD at 22:52:50; 23:03:47), and hair (DVD at 23:03:58). Licensee also mocks the phlebotomist's skills, (DVD at 22:53:02; 22:55:01), and the salary she was paid. (DVD at 22:57:50.)

As a result of Licensee's words and actions at the DUI center, the officer processed her case as a refusal to submit to chemical testing, and DOT suspended her operating privilege. Licensee appealed the suspension, and the trial court held a hearing on December 9, 2010. At the hearing, Licensee stipulated that the arresting officer had reasonable grounds to believe that she was operating a motor vehicle while under the influence of alcohol and that the officer arrested her for this violation. (N.T. at 4.) Therefore, the sole issue for consideration was whether or not Licensee's conduct at the DUI center constituted a refusal of chemical testing.⁴

³ The trial court states that the phlebotomist had several "breaks in professionalism" during her encounter with Licensee, (trial court op. at 6), but our review of the DVD leads us to conclude that the phlebotomist did a remarkable job of maintaining her composure under the circumstances.

⁴ In order to suspend a licensee's operating privilege, DOT has the burden of proving that the licensee:

- (1) was arrested for driving under the influence by a police officer who had reasonable grounds to believe that the licensee was operating or was in actual physical control of the movement of the vehicle while under the influence of alcohol;
- (2) was asked to submit to a chemical test;
- (3)

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The trial court sustained Licensee's appeal on the basis that Licensee was "willing to submit to chemical testing, just not at the risk to her employment." (Trial court op. at 5.) On appeal to this court,⁵ DOT argues that the trial court erred in concluding that Licensee consented to chemical testing. According to DOT, Licensee refused chemical testing both by her conduct at the DUI center and by refusing to go the hospital. We agree.

Whether a licensee has refused a request for chemical testing is a question of law based upon the facts as found by the trial court. Department of Transportation v. Renwick, 543 Pa. 122, 669 A.2d 934 (1996). This court may review the DVD made at the DUI center in order to determine whether the trial court's findings are supported by competent evidence. Hatalski v. Department of Transportation, Bureau of Driver Licensing, 666 A.2d 386 (Pa. Cmwlth. 1995).

A licensee may not dictate conditions for drawing blood. Winebarger v. Department of Transportation, Bureau of Driver Licensing, 655 A.2d. 1093 (Pa. Cmwlth. 1995). Anything less than "unqualified, unequivocal assent" constitutes a refusal under [section] 1547." Department of Transportation v. Renwick, 543 Pa. 122, 131, 669 A.2d 934, 939 (1996) (holding that, where the licensee verbally agreed

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refused to do so; and (4) was warned that refusal might result in a license suspension.

Banner v. Department of Transportation, Bureau of Driver Licensing, 558 Pa. 439, 445, 737 A.2d 1203, 1206 (1999). Once DOT meets its burden of proof in a suspension proceeding, the burden shifts to the licensee to prove that she either was physically unable to take the test or that her refusal was not knowing or conscious. Zwibel v. Department of Transportation, Bureau of Driver Licensing, 832 A.2d 599 (Pa. Cmwlth. 2003).

⁵ This court's scope of review in a license suspension case is limited to determining whether the trial court's findings of fact are supported by competent evidence and whether the trial court **(Footnote continued on next page...)**

to testing but closed her eyes, turned her head away, and ignored requests by two separate officers to sign a consent form, her actions would be deemed a refusal). A refusal can be expressed in words or by the licensee's conduct. Id.

Here, Licensee preconditioned her assent to the blood test by telling the phlebotomist she only had one chance to draw blood. This is an impermissible precondition, and suffices as a refusal under the implied consent law. See Winebarger (stating that, where licensee was only willing to submit to one venipuncture in each arm, such conditional acceptance would be justification for the licensee's suspension). Although Licensee changed her mind and requested a second venipuncture later, she had become so argumentative and hostile toward the phlebotomist by then that her conduct rendered her consent illusory and, in effect, a refusal. Further, Licensee flatly stated, "No, it's a refusal."

Moreover, Pennsylvania courts have long recognized that it is permissible for a police officer to transport the licensee to a hospital if chemical testing is unsuccessful at a DUI center or police station. See Books v. Commonwealth, Department of Transportation Bureau of Driver Licensing, 530 A.2d 972 (Pa. Cmwlth. 1987) (police officer transported licensee to the hospital for a blood test after unsuccessfully attempting to get licensee to complete a breathalyzer test); Commonwealth v. Brozik, 527 A.2d 161 (Pa. Super. 1987) (licensee was transported to the hospital after the intoxilyzer at the police barracks malfunctioned). Given Licensee's behavior and hostility toward the phlebotomist, along with the fact that the DUI center did not have the type of needle Licensee claimed was necessary, it was entirely reasonable for the police officer to attempt to take Licensee to a hospital.

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committed an error of law or an abuse of discretion. Orloff v Department of Transportation, Bureau of Driver Licensing, 912 A.2d 918, 922 (Pa. Cmwlth. 2006).

The trial court found that Licensee was willing to go to a hospital, just not Easton Hospital. This finding is unsupported by substantial evidence. Licensee was adamant from the very start that she would not to go any hospital, and, initially, said the reason she would not go was that she did not want to waste time. Even if Licensee had been willing to go to some hospital other than Easton Hospital, this would have been another impermissible condition placed on her assent to chemical testing. Winebarger. Moreover, the law is clear that it is the police officer, not the licensee, who determines the place where chemical testing is to take place. Brozik.⁶

The trial court also noted that the police officer could have given Licensee a breath test in order to avoid jeopardizing her employment. However, the law does not support the notion that the police should have offered Licensee an alternative type of test. Although the Implied Consent Law states that a driver consents to “one or more chemical tests of breath, blood or urine,” the officer need only offer one such test, 75 Pa. C.S. §1547; Books, and the type of chemical test to be administered is solely within the discretion of the police officer. Mooney v. Department of Transportation, Bureau of Driver Licensing, 654 A.2d 47 (Pa. Cmwlth. 1994) (holding that police have unfettered discretion in determining which test to administer). Therefore, the fact that the arresting officer did not offer Licensee an opportunity to take a breath test in order to avoid going to Easton Hospital is irrelevant.

Once DOT meets its burden of proof in a suspension proceeding, the burden shifts to the licensee to prove that she either was physically unable to take the

⁶ In Brozik, the licensee argued that when the breath analysis machine at the state police barracks malfunctioned, he should have been transported to another state police barracks, rather than to the local hospital, for a blood test. The Superior Court disagreed, holding that the “police have the option of conducting whichever test is most expedient under the circumstances.” Id. at 164.

test or that her refusal was not knowing or conscious. Zwibel v. Department of Transportation, Bureau of Driver Licensing, 832 A.2d 599 (Pa. Cmwlth. 2003). Licensee did not meet that burden here. Licensee’s conditional consent and conduct, including her statement, “No, it’s a refusal” was just that—a refusal and not the “unqualified, unequivocal assent” required under section 1547.

For all of the foregoing reasons, we conclude that, as a matter of law, Licensee refused chemical testing under section 1547 of the Vehicle Code, and, therefore, the eighteen-month suspension imposed by DOT was appropriate.

Accordingly, we reverse.

PATRICIA A. McCULLOUGH, Judge

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Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

ORDER

AND NOW, this 6th day of December, 2011, the order of the Court of Common Pleas of Northampton County, dated December 9, 2010, is reversed and the eighteen-month suspension of Lynn Marie Fortebuono's operating privilege is hereby reinstated.

PATRICIA A. McCULLOUGH, Judge