

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

SCOTT JAMES MCFARLAND

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3187 EDA 2011

Appeal from the Judgment of Sentence of April 11, 2011
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0003798-2010

BEFORE: SHOGAN, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J.

Filed: March 12, 2013

Scott McFarland [“Appellant”] pleaded guilty to driving under the influence-second offense¹ and refusing to submit to alcohol testing.² Appellant was sentenced to one hundred and thirty-five days of house arrest, to be followed by a fifty-five month and fifteen day term of probation. Upon review, we affirm.

The trial court summarized the factual and procedural history as follows:

* Retired Senior Judge assigned to the Superior Court.

¹ 75 Pa.C.S.A. § 3802(a)(1).

² 75 Pa.C.S.A. § 3804(c).

On June 25, 2010, at approximately 1:00 AM, Officer Deron Dorward of the Slatington Police Department was in full uniform, operating a marked patrol unit in the area of West Church Street and 4th Street in Slatington, Lehigh County, Pennsylvania. Dorward was investigating an unrelated matter. Officer Scott Ledo of the Walnutport Police Department responded to Dorward's location to assist. As Ledo was traveling northbound in the 700 block of Main Street, he observed a gray Honda Passport swerve and almost strike a curb. Ledo watched the Honda as it continued to swerve back and forth within its lane. Dorward heard Ledo's radio transmission of what he observed and responded to Ledo's location.

Meanwhile, Officer Ledo activated his lights and attempted a traffic stop. The driver of the Honda failed to stop. The driver continued to 403 Pine Street, pulled into the driveway, and exited the Honda. Ledo approached the car and smelled a strong odor of an alcoholic beverage. The driver attempted to walk into the residence, but was stopped by Ledo. Officer Dorward then arrived on scene. Dorward spoke to the driver, who was identified as [Appellant] and also detected a strong odor of alcohol. [Appellant] refused to perform field sobriety tests. Dorward was of the opinion that [Appellant] was incapable of safe driving, so he took [Appellant] into custody for suspicion of DUI. Dorward transported [Appellant] to the DUI booking center. At the center, [Appellant] refused chemical testing.³ Dorward read [Appellant] his chemical test warnings, and [Appellant] refused to sign the DL-26 form.⁴ The form was marked and admitted into evidence as Defendant's Exhibit 1.

³ Neither party produced a video recording from the DUI center.

⁴ See Affidavit of Probable Cause.

Following this incident, [Appellant] was charged with DUI and Fleeing or Attempting to Elude a Police Officer. On April 11, 2011, [Appellant] pleaded guilty to one count of DUI, second offense with a refusal. [Appellant] completed a detailed oral and written guilty plea colloquy.⁵ I found his plea to be voluntarily and understandingly tendered, and I accepted the plea. Because of his refusal to submit to chemical testing, [Appellant] was facing a mandatory minimum of 90 days['] imprisonment, a maximum of 5 years['] imprisonment, and a fine of not less than \$1500.00. [Appellant] requested house arrest. The parties

reached an agreement for 135 days of house arrest, followed by 55 months and 15 days probation, to commence on May 19, 2011. As such, I sentenced [Appellant] to same. Following his sentence, [Appellant] filed a Motion for Reconsideration of Sentence.

⁵ The written guilty plea colloquy is incorporated herein.

In his motion, [Appellant] alleges the sentencing enhancement based on his refusal is unconstitutional. [Appellant] claims he was not properly advised of his refusal warnings. On October 5, 2011, a hearing was held on the motion, at which time [Appellant] testified. [Appellant] stated he was never given refusal warnings. When shown Defendant's Exhibit 1, [Appellant] advised no one ever read him the warnings contained therein. [Appellant] further testified that he had not been drinking that night, and that he refused to give blood due to a fear of needles.

The parties made oral argument on the record. I found the issue did not amount to an illegal sentence. [Appellant] was aware of what the sentence would be prior to pleading guilty, and knowingly and understandingly entered the plea. The issue, therefore, should have been raised prior to [Appellant]'s guilty plea. As such, I advised the parties that I would allow [Appellant] to withdraw his guilty plea, but would deny the motion for reconsideration. [Appellant] stated he wanted some time to think about it.

A second hearing was held October 10, 2011, at which time [Appellant] indicated he wanted to continue on the motion for reconsideration. I thereafter denied the motion.

Trial Court Opinion ["T.C.O."], 12/22/11, at 1-3.

On November 7, 2011, Appellant appealed. The trial court did not order Appellant to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant presents a single issue for our review: "Did the Commonwealth meet its burden to establish that the police read the

required 75 P.S. § 1547 (b)(2)(ii) '**O'Connell**'^[3] warning to McFarland in order for the trial court to impose the enhanced penalty of 55 months['] 15 days['] probation resulting from McFarland's refusal to submit to chemical testing?" Appellant's Brief at 2.

Appellant asserts that the refusal enhancement was improper, and that, as a result, his sentence is outside the statutory parameters. **Commonwealth v. Jacobs**, 900 A.2d 368 372-73 (Pa. Super. 2006). "A plea of guilty constitutes a waiver of all nonjurisdictional defects and defenses. When a defendant pleads guilty, he waives the right to challenge anything but the legality of his sentence and the validity of his plea." **Commonwealth v. Jones**, 929 A.2d 205, 212 (Pa. 2007) (quoting **Commonwealth v. Montgomery**, 401 A.2d 318, 319 (Pa. 1979)). "[C]laims pertaining to the legality of sentence are non-waivable, may be leveled for the first time on appeal, and our jurisdiction need not be invoked in a Pa.R.A.P. 2119(f) statement." **Commonwealth v. Foster**, 960 A.2d 160, 163 (Pa. Super. 2008). Inasmuch as Appellant's claim challenges the legality of his sentence, our scope of review is plenary and our standard is *de novo*. **Commonwealth v. McKibben**, 977 A.2d 1188, 1191 (Pa Super. 2009). Whether Appellant was read the required **O'Connell** warnings is a

³ **Com., Dept. of Transp., Bureau of Traffic Safety v. O'Connell**, 555 A.2d 873 (Pa. 1989).

factual question reserved for the trial court. "Questions of credibility and conflicts in the evidence presented are for the trial court to resolve, not our appellate courts." *O'Connell*, 555 A.2d at 875.

Pursuant to 75 Pa.C.S.A. § 1547(b)(2)(ii), a police officer is required to inform an individual refusing chemical testing that he or she will be subject to enhanced penalties if he or she is convicted of or pleads guilty to an offense under Section 3802(a)(1). 75 Pa.C.S.A. § 1547(b)(2)(ii); *Commonwealth v. Xander*, 14 A.3d 174, 179 (Pa. Super. 2011).

Appellant claims that he was never warned of the consequences of refusal. He points to an inconsistency on his DL-26 Form as proof of the failure to warn. We agree that there is a mistake on the DL-26 Form. However, Appellant interprets the form incorrectly. Appellant states, "According to the Form DL-26 [Officer Deron Dorward] the arresting officer from the Slatington Police Department indicates that he read the required 75 P.S. § 1547(b)(2)(ii) warning to [Appellant] while Detective Magan of the Lehigh County DUI Booking Center indicates that he, **not** Officer Dorward, read the required 75 P.S. § 1547(b)(2)(ii) warning to McFarland." Appellant's Brief at 20 (emphasis in original). Appellant is incorrect, for the reasons that follow.

Officer Deron Dorward signed the DL-26 Form indicating that Appellant was arrested and that Officer Dorward witnessed Appellant's refusal and read Appellant the *O'Connell* warnings. *See* Commonwealth's Exhibit 1 (showing Officer Dorward signed the form, indicating that Officer

Dorward informed Appellant that Appellant was “under arrest,” and attesting that Officer Dorward read the ***O’Connell*** warnings to Appellant). Detective Magan’s name and affiliation appear on the same DL-26 Form, next to the following text: “Please list name, badge number, and phone number of arresting officer if not the same officer who witnessed the refusal.” ***Id.*** Thus, the form indicates that Detective Magan was the arresting officer, but did not witness the refusal. ***Id.*** According to Appellant, this suggests a contradiction and indicates that neither Officer Dorward nor Detective Magan read Appellant the ***O’Connell*** warning. Appellant’s Brief at 20. Appellant is incorrect.

The form indicates that Officer Dorward informed Appellant that he was under arrest, and that Officer Dorward proceeded to provide the ***O’Connell*** warnings. The form also indicates that Detective Magan arrested Appellant. It does not indicate that Detective Magan read Appellant the ***O’Connell*** warnings. Appellant urges that this is a fatal inconsistency indicating confusion regarding the arresting officer’s identity and suggesting that Appellant was not provided ***O’Connell*** warnings.

Appellant’s arguments are unavailing. The arresting officer’s identity is not at issue. We are here concerned only with whether Appellant was read the ***O’Connell*** warnings. The DL-26 Form states explicitly that Officer Dorward read Appellant his ***O’Connell*** warnings. This fact is further buttressed by Officer Dorward’s affidavit of probable cause, which attests:

Once at the DUI center, McFarland refused any chemical test. Your affiant did read McFarland his chemical test warnings under Section 1547 of the Pennsylvania Vehicle Code relating to chemical test warnings. McFarland refused to sign the DL-26 Form.

Affidavit of Probable Cause, 6/25/10, at 2.

In addition, Appellant signed an implied consent form at the DUI Processing Center that stated: "Your refusal to submit to a test will result in an enhanced penalty if you are found or plead guilty to driving under the influence." Commonwealth's Exhibit 2. Moreover, the trial court did not find Appellant's testimony that he was never read the *O'Connell* warnings to be credible. T.C.O. at 4.

The warnings contained on the DL-26 Form are sufficient to inform an appellant of the consequences of refusing chemical testing. *Witmer v. Com., Dept. of Transp., Bureau of Driver Licensing*, 880 A.2d 716, 720-21 (Pa. Commw. 2005). Here, Appellant also received an additional warning when he was taken to the DUI Processing Center. Because the record supports the trial court's finding that Appellant was read the *O'Connell* warnings, we find that the sentencing enhancement was proper. Appellant's sentence was not illegal.

Sentence affirmed. Jurisdiction relinquished.