

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CLAIR L. GETGEN, :
Plaintiff : LICENSE SUSPENSION
 :
vs. : NO. 02-01,699
 :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF TRANSPORTATION :

Date: December 24, 2002

OPINION and ORDER

The motion before the Court is Plaintiff, Clair L. Getgen's, Petition Appealing Proposed Suspension of Driving Privileges filed September 20, 2002. Plaintiff was notified via mail that the Department of Transportation was suspending his driving privileges for one year pursuant to 75 Pa.C.S.A. §1547. Plaintiff is now appealing the proposed suspension alleging that 75 Pa.C.S.A. §1547 is inapplicable because probable cause did not exist to arrest him for driving under the influence of alcohol.

The following are the relevant facts upon which the Court basis its decision.¹ On August 7, 2002, at approximately 10:30 p.m. in Hughesville, Pennsylvania, Officer Shearer was traveling west on Water Street. Officer Shearer observed a black Mercedes driven by the Plaintiff also traveling west on Water Street. Officer Shearer saw the Mercedes cross the centerline of traffic and then go back into its lane. While still on Water Street, Officer Shearer witnessed the Mercedes cross the centerline again and travel the centerline for about one block.

¹ The facts are based on the preliminary hearing testimony of Officer Richard Shearer, a member of the Hughesville Police Department, submitted by stipulation of counsel at the suspension hearing held November 5, 2002.

According to Officer Shearer, the Mercedes then “swerved” back into its lane. The Mercedes then approached the intersection of Water and Main Streets.

The Mercedes proceeded to make a left turn onto Main Street. While executing this turn, the Mercedes went wide into the parking lane, nearly striking the curb. According to Officer Shearer, as the Mercedes was “straightening up it crossed the center line of traffic again and then swerved back into its own lane.” Officer Shearer continued to follow the Mercedes south on Main Street. As the vehicle traveled south on Main Street, the Mercedes continued to cross the centerline and veer into the parking lane. Officer Shearer’s observations of the Mercedes occurred over approximately a two-minute period and for a distance of about one mile.

As the Mercedes approached the borough line, Officer Shearer activated the emergency lights and pulled the car over. As Officer Shearer was about to exit his cruiser, he observed the Mercedes surge forward then stop. Officer Shearer approached the vehicle and asked for the driver’s license, registration, and insurance card. Plaintiff could not remember what he did with the registration or insurance card. Officer Shearer noted that Plaintiff appeared confused and that there was a very strong odor of alcohol coming from the Plaintiff’s breath. Plaintiff eventually found the registration and insurance card in the glove compartment, after Officer Shearer suggest that he look there. When asked by Officer Shearer if he had been drinking, Plaintiff said he had three beers with supper. Officer Shearer then asked Plaintiff to step out of the vehicle to perform field sobriety tests. Officer Shearer instructed Plaintiff to perform the finger-to-nose test. Plaintiff failed that test. While performing the test, Plaintiff

was observed to be swaying badly. Officer Shearer did not have Plaintiff perform the one-leg stand test because Plaintiff indicated he had a problem with his knee.

Based on the erratic driving, odor of alcohol, and failure of the field sobriety tests, Officer Shearer concluded that Plaintiff could not operate his vehicle safely because he was under the influence of alcohol. Officer Shearer requested that a blood test be taken to ascertain Plaintiff's blood-alcohol content. Plaintiff refused the test after being explained Pennsylvania's Implied Consent Law. Officer Shearer warned Plaintiff about the Implied Consent Law by reading verbatim from the standard Implied Consent Warning. Plaintiff signed the standard warning and refused the test after being so advised. At no time did Plaintiff sign a written refusal. As a result of Plaintiff's refusal, no blood sample was taken to determine Plaintiff's blood alcohol content.

The issue before the Court is whether Plaintiff's driving privileges can be validly suspended for refusing to provide a blood sample? In order to answer that question, the Court must determine whether Officer Shearer had probable cause to arrest Plaintiff for operating a motor vehicle while under the influence of alcohol to such a degree that Plaintiff was incapable of safe driving. The Pennsylvania implied consent statute states:

Any person who drives, operates or is in actual physical control of the movement of a motor vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating, or in actual physical control of a motor vehicle:

(1) while under the influence of alcohol or a controlled substance or both ...

75 Pa.C.S.A. §1547(a)(1). For 75 Pa.C.S.A. §1547 to validly apply, the police officer must have probable cause “to believe that a suspect has been driving under the influence of alcohol or a controlled substance.” *Commonwealth v. Slonaker*, 795 A.2d 397, 401 (Pa. Super. 2002). An officer has probable cause if he has “knowledge of sufficient facts and circumstances, gained through trustworthy information, to warrant a prudent man to believe that the person seized has committed a crime.” *Ibid*. That is, probable cause is “a reasonable belief, based on the surrounding facts and totality of circumstances, that an illegal activity is occurring or evidence of a crime is present.” *Commonwealth v. Petrell*, 738 A.2d 993, 998 (Pa. 1999).

To prove a violation of 75 Pa.C.S.A. §3371(a)(1), the Commonwealth must demonstrate “(1) that the defendant was the operator of a motor vehicle and (2) that while operating the vehicle, the defendant was under the influence of alcohol to such a degree as to render him or her incapable of safe driving.” *Commonwealth v. Palmer*, 751 A.2d 223, 228 (Pa. Super. 2000); 75 Pa. C.S.A. 3371(a)(1). “To establish the second element, it must be shown that alcohol has substantially impaired the normal mental and physical faculties required to safely operate the vehicle.” *Palmer*, 751 A.2d at 228. Substantial impairment is “a diminution or enfeeblement in the ability to exercise judgment, to deliberate or to react prudently to changing circumstances and conditions.” *Ibid*.

Probable cause to arrest for driving under the influence does not require the failure of field sobriety tests. *Slonaker*, 795 A.2d at 402. That is, probable cause does not have as a “prerequisite failure of field sobriety tests.” *McDonald v. Commonwealth of Pennsylvania, Dep’t of Transp.*, 567 A.2d 1127, 1129 (Pa. Cmwlth. 1989). However, failing a field sobriety test is evidence that “the driver [is] not in control of himself” and “could establish

that the driver was under the influence of alcohol to a degree which rendered him incapable of safe driving.” *Commonwealth v. Kowalek*, 647 A.2d 948, 952 (Pa. Super. 1994).

Field sobriety tests, such as the one leg stand, the finger to nose, and walking in a straight line, “are grounded in theories which link an individual’s lack of coordination and loss of concentration, with intoxication.” *Commonwealth v. Ragan*, 652 A.2d 925, 928 (Pa. Super. 1995). “This inter-relationship is also recognized in what is generally accepted as the common indicia of intoxication, within the understanding and experience of ordinary people.” *Ibid.* For instance, the inability to follow simple instructions, to walk upright without stumbling, swaying or seeking support are “reflective of the ordinary signs of intoxication discernable by a layperson.” *Ibid.* The effects of alcohol on an individual may vary, but there are commonly observed characteristics of alcohol intoxication that are part of the common knowledge. The field sobriety tests are methods used to demonstrate those characteristics.

In *Commonwealth v. Lymph*, the arresting officer did have probable cause to believe that defendant was operating a vehicle under the influence of alcohol to such a degree as to render him incapable of safe driving. 538 A.2d 1368, 1370 (Pa. Super. 1988). The officer observed the defendant’s vehicle break sharply on two occasions and cross the yellow center line four to five times over a four-block distance. *Id.* at 1369. After stopping the vehicle, the officer approached the defendant and observed that her eyes were red and glassy and that there was an odor of alcohol. *Ibid.* The officer then asked the defendant to perform several field sobriety tests, which she failed. *Ibid.* The erratic driving, odor of alcohol, and failure of the field tests provided the officer with probable cause to arrest. *See also, Slonaker*, 795 A.2d 397 (Officer had probable cause where he observed, over a five mile distance, the defendant

continuously weave from side to side across the road, the defendant had blood shot and glassy eyes, there was an odor of alcohol emanating from the defendant, and the defendant failed two field sobriety tests.); *Commonwealth v. Ragan*, 652 A.2d 925 (Pa. Super. 1995) (Officer had probable cause where he observed the defendant drive in and out of his lane at a high rate of speed, detected an odor of alcohol on the defendant's breath, and the defendant failed three field sobriety tests.)

In *Commonwealth v. Kowalek*, the arresting officer did have probable cause to believe that defendant was operating a vehicle under the influence of alcohol to such a degree as to render him incapable of safe driving. *See*, 647 A.2d 948, 952 (Pa. Super. 1994). The arresting officer was on duty at a field sobriety checkpoint. When he approached the defendant's vehicle, the trooper detected a strong odor of alcohol. *Id.* at 949. The trooper also "noticed [that the] defendant had red, bloodshot eyes, slurred speech and refused to direct his voice toward the trooper." *Ibid.* The defendant also had difficulty "in producing his driver's license, registration, and proof of insurance." *Ibid.* The trooper then had the defendant exit the vehicle and perform the one leg stand field sobriety test, which the defendant failed." *Ibid.* All of this led the trooper to the conclusion that the defendant was substantially impaired, as to render him unsafe to drive, because of alcohol. *See, Id.* at 952; *See also, Commonwealth v. Feathers*, 660 A.2d 90 (Pa. Super. 1995) (Officers had probable cause where they observed that the defendant had glassy eyes, slurred speech, had difficulty producing her license and insurance card, swayed when she stood, and failed two field sobriety tests.).

In the case *sub judice*, Officer Shearer had probable cause to arrest Plaintiff for driving a motor vehicle while under the influence of alcohol to such a degree as to render him

incapable of safe driving. Officer Shearer had observed Plaintiff drive erratically. Plaintiff had crossed the centerline a number of times and strayed into the parking lane, almost hitting the curb, when making a left turn. When Officer Shearer had stopped Plaintiff, he detected an odor of alcohol on Plaintiff's breath. Officer Shearer also noted that Plaintiff had trouble finding the insurance card and registration and slurred his speech. Officer Shearer then administered a field sobriety test that Plaintiff failed. During the administration of this test, Officer Shearer observed that Plaintiff was swaying badly. An argument can be made that the swaying was the result of Plaintiff's knee injury, and not alcohol related. But in the context of the surrounding circumstances, the swaying is more likely the result of alcohol impairment than a knee injury.

The Plaintiff's erratic driving demonstrates that he could not operate a vehicle safely. The odor of alcohol on his breath, slurred speech, confusion regarding the location of the insurance card and registration, and failing the field sobriety test indicate that it was alcohol impairment that was the cause of the erratic driving. Therefore, Officer Shearer had probable cause to arrest Plaintiff for operating a motor vehicle while under the influence of alcohol to such a degree that Plaintiff was incapable of safe driving.

Officer Shearer had probable cause to arrest Plaintiff for driving under the influence. Therefore, 75 Pa.C.S.A. §1547 validly applies. Thus, Plaintiff's Petition Appealing Proposed Suspension of Driving Privileges must be denied.

ORDER

It is HEREBY **ORDERED** that Plaintiff, Clair L. Getgen's, Petition Appealing Proposed Suspension of Driving Privileges filed September 20, 2002 is denied. The Department shall re-impose the suspension without delay.

BY THE COURT:

William S. Kieser, Judge

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