

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

vs.

ALLAN LEWIS MORIARITY,

Defendant

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: NO. 03-00,778
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: LICENSE SUSPENSION APPEAL

Date: February 19, 2004

OPINION and ORDER

Before the Court for determination is the License Suspension Appeal of Defendant Allan Lewis Moriarity filed May 16, 2003. The Court will deny Defendant’s appeal.

On April 17, 2003, the Pennsylvania Department of Transportation (DOT) notified the Defendant that his operating privileges would be suspended effective May 22, 2003. The suspension arose out of an incident that occurred on March 27, 2003. On that date, the Defendant was involved in a motor vehicle accident. Pennsylvania State Trooper Paul McGee arrested Defendant for Driving Under the Influence of Alcohol. Trooper McGee transported Defendant to the hospital to receive medical treatment and for chemical testing to determine Defendant’s blood alcohol content.

Initially, Defendant refused to submit to chemical testing. Once the phlebotomist entered the treatment room, Trooper McGee read Defendant the Implied Consent Law. That is, Trooper McGee advised Defendant that if Defendant did not submit to chemical testing his driver’s license would be suspended. Defendant then agreed to provide a blood sample for testing. The phlebotomist wrapped Defendant’s arm, swabbed the intended

insertion site, and inserted the needle. During this initial insertion, a few drops were drawn and Defendant began to complain that it hurt. The phlebotomist made a few more attempts to draw blood from Defendant's arm, but was unsuccessful. Defendant informed the phlebotomist that he had Hepatitis C and that she should try taking a sample from his hand. No attempt was made to draw blood from Defendant's hand.

The few drops of blood that had been drawn from Defendant were not tested. The phlebotomist had disposed of the sample. It was her opinion that the sample was inadequate for testing. The phlebotomist testified that standard hospital procedure was for her to submit the sample to the lab and that the lab made the definitive determination regarding sufficiency of a blood sample for chemical testing.

Defendant argues that he submitted to chemical testing and that his license should not have been suspended. Defendant argues that he complied with the request to provide a blood sample. He asserts that he allowed his arm to be wrapped, the area swabbed, and the needle inserted. Defendant stresses that he allowed the phlebotomist to make several attempts to draw blood from his arm and even suggested an alternate site from which to draw a sample. Defendant further contends that he did give a blood sample. It was only a few drops, but a sample was given. Defendant argues that the Commonwealth has the burden of proving that the sample was insufficient and it has not carried its burden.

The Commonwealth argues that Defendant refused to give an adequate sample of his blood for testing. The Commonwealth argues that a refusal is not limited to a verbal "no," but can be based on the actions or inactions of Defendant. Here, the Commonwealth argues that Defendant refused to provide a sample because he did not comply with the

necessities of the testing. The Commonwealth argues that Defendant frustrated the testing by telling the phlebotomist to stop, which resulted in only a few drops of his blood being drawn.

What is commonly referred to as the Implied Consent Law can be found at 75 Pa.C.S.A.

§1547. It states that:

Any person who drives, operates or is 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 the movement of a motor vehicle:

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

(2) which was involved in an accident in which the operator or passenger of any vehicle involved or a pedestrian required treatment at a medical facility or was killed.

75 Pa.C.S.A. §1547(a). An individual who is arrested for driving under the influence of alcohol or a controlled substance and refuses to submit to the requested chemical testing will have his operating privileges suspended for one year. 75 Pa.C.S.A §1547(b)(1). In order for the DOT to sustain a license suspension under this provision, it must prove that “the licensee (1) was arrested for driving under the influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was specifically warned that a refusal would result in the revocation of his driver’s license.” *Todd v. Dep’t of Transp.*, 723 A.2d 655, 657 (Pa. 1999); *McGee v. Dep’t of Transp.*, 803 A.2d 255, 258 (Pa. Cmwlth. 2002). If the DOT establishes this, then the burden shifts to the license to “prove that his refusal was not knowing

or conscious or that he was physically unable to take the test.” *Dep’t of Transp. v. Boucher*, 691 A.2d 450, 453 (Pa. 1997).

A refusal is not limited to that of an express response by the licensee. *Purcell v. Dep’t of Transp.*, 689 A.2d 1002, 1005 (Pa. Cmwlth. 1997). A refusal can be implied from the licensee’s conduct. *Finney v. Dep’t of Transp.*, 721 A.2d 420, 424 (Pa. Cmwlth. 1998). Any response that is less than an unqualified, unequivocal assent to submit to testing constitutes a refusal. *Todd*, 723 A.2d at 658; *Finney*, 721 A.2d at 423. Whether conduct constitutes a refusal is a question of law for the court to decide. *McGee*, 803 A.2d at 259, n.5; *Mueller v. Dep’t of Transp.*, 657 A.2d 90, 93 (Pa. Cmwlth. 1993).

A licensee is not only required to submit to chemical testing, but is required to complete the testing. *Murray v. Commonwealth*, 598 A.2d 1356, 1358 (Pa. Cmwlth. 1991). A failure to provide a sufficient sample is a refusal, even if the licensee makes a good faith effort. *See, Sweeney v. Dep’t of Transp.*, 804 A.2d 685, 687 (Pa. Cmwlth. 2002) (The “law is now well established that failure to complete a breathalyzer test, whether or not a good faith effort was made to do so, constitutes a refusal per se to taking the test”); *Postgate v. Dep’t of Transp.*, 781 A.2d 276, 280 (Pa. Cmwlth. 2001) (A deliberate refusal to properly execute a breathalyzer test was a refusal as the licensee did not provide a sufficient sample.); *Finney*, 721 A.2d at 424 (A failure to provide an adequate breath sample was a refusal.). This is because “the purposes of the implied consent law would be undermined if licensees, by their volitional conduct, were permitted to thwart testing during administration.” *Todd*, 723 A.2d at 658.

However, a licensee must be allowed a reasonable and sufficient opportunity to complete the test. *Todd*, 723 A.2d at 658. If the licensee still fails to provide a sufficient

sample after being given a reasonable opportunity, then the burden shifts to the licensee to prove by competent medical evidence that he was physically unable to take the test. *Mueller*, 657 A.2d at 95. The licensee is also required to inform the law enforcement agent of his inability to take the test, unless that inability is obvious, so that the law enforcement agent can provide alternative testing. *Schlater v. Dep't of Transp.*, 744 A.2d 814, 816 (Pa. Cmwlth 2000); *Finney*, 721 A.2d at 424.

Defendant does not dispute that the Commonwealth has established that Defendant was arrested for driving under the influence of alcohol, was asked to submit to chemical testing, and that Defendant was warned that refusal to submit to chemical testing would result in suspension of his driver's license. What Defendant does contest is that he refused to submit to chemical testing. Therefore, the issue that confronts the Court is whether Defendant refused to submit to chemical testing when several attempts to draw blood from his arm only yielded a few drops.

The Court has concluded that Defendant refused to submit to chemical testing. His refusal is based on his failure to provide an adequate blood sample for the test to be done. The law is clear. If a licensee fails to provide a sufficient sample, then he has refused to submit to chemical testing.

It is true that Pennsylvania law has not established a set quantity of blood in order to establish a sufficient sample. *Murray*, 598 A.2d at 1360; *Feathers v. Dep't of Transp.*, 682 A.2d 1359, 1362 (Pa. Cmwlth. 1996). What is clear under Pennsylvania law is that the licensee must give a sample sufficient to perform the test. *Murray*, 598 A.2d at 1360. That was not the case here.

The Court accepts the testimony of the phlebotomist that the sample provided by the Defendant was insufficient to perform the test. While the lab may have regularly made the definitive determination regarding the sufficiency of a sample, the phlebotomist was familiar with amount of blood the lab would deem necessary to perform the test. Based on her experience and knowledge concerning the amounts the lab would accept and the amounts the lab would reject, the phlebotomist determined that the lab would not deem this sample sufficient.¹

Having established that the blood sample given by Defendant was insufficient, the burden shifted to Defendant to prove by competent medical evidence that he was physically unable to perform the test. Defendant has not carried his burden. Defendant did tell the phlebotomist that he had Hepatitis C and that it was difficult to draw blood from his arms. However, Defendant did not offer any medical evidence demonstrating that his Hepatitis C or

¹ Defendant cites to *Feathers v. Dep't of Transp.*, *supra*, for the proposition that the Commonwealth was required to actually test the sample given by Defendant before It could state that the sample was insufficient and that Defendant had refused to submit to chemical testing. The *Feathers* case does not require the Commonwealth to test every sample before a determination of refusal is made. Requiring the Commonwealth to test the sample before it determined that defendant refused to submit to testing was a result of the facts of the case in *Feathers*. In *Feathers*, there was no evidence as to what amount of blood equaled a sufficient sample. The blood alcohol test kit provided two vials to be used in collecting the sample. When Defendant opened and spilled one of the vials containing his blood, the police officer viewed this as a refusal. The Commonwealth argued that a complete sample was two vials.

The issue in the case was whether the destruction of one of the vials constituted a refusal. *Feathers*, 682 A.2d at 1361. Put another way, whether two vials of blood was the standard amount that constituted an adequate sample and anything less was a refusal. The Commonwealth Court stated that there was no set amount of blood established by law that constituted an adequate sample for purposes of chemical testing. *Id.* at 1362. As such, there was no way for the Commonwealth Court to determine whether the sample was sufficient absent a determination by the testing entity. That is why the Commonwealth Court said that the Commonwealth should have tested the vial. Testing the vial would have determined if it was a sufficient sample

Here, there is evidence that the sample was insufficient. The phlebotomist testified that the sample given by Defendant was insufficient to perform the blood alcohol test. This was based on her experience with the lab performing the test and what amount that lab required to do the test. As such, there was no need to send Defendant's sample to the lab for it to determine that the sample was insufficient. Therefore, *Feathers* is inapplicable to the case *sub judice*.

any related physical condition prevented him from providing an adequate blood sample. As such, Defendant has failed to rebut the conclusion that he refused to submit to chemical testing.

Accordingly, Defendant's License Suspension Appeal is denied.

ORDER

It is hereby ORDERED that License Suspension Appeal of Defendant Allan Lewis Moriarity filed May 16, 2003 is DENIED.

Defendant is ORDERED to surrender his driver's license to the Pennsylvania Department of Transportation upon notice of this ORDER.

BY THE COURT,

William S. Kieser, Judge

cc: Donald Martino, Esquire
Francis Bach, Esquire
Judges
Christian Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)