IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee	: NO. 04-00,800
vs.	:
DONALD K. RICKARD, Appellant	:

OPINION IN SUPPORT OF ORDER OF SEPTEMBER 29, 2004, IN COMPLIANCE WITH RULE 1925(A) OF THE RULES OF APPELLATE PROCEDURE

Appellant was arrested for DUI on March 15, 2004, but when requested by the arresting state trooper to submit to chemical testing of his blood, refused such request. DOT thereafter issued a notice of suspension of Appellant's operating privileges under Section 1547(b) of the Vehicle Code. 75 Pa.C.S. Section 1547(b). Appellant filed an appeal of that suspension but after a hearing on September 29, 2004, this Court denied that appeal.

In the instant appeal, Appellant contends only that his refusal was not a knowing and conscious decision, based on the chemical test warnings provided to him prior to the request.[1] Specifically, Appellant argues he was not provided enough specifics with respect to the possible consequences of a refusal to make a knowing and conscious decision whether to submit to chemical testing.

According to the state trooper who arrested Appellant and transported him to the hospital for the purpose of obtaining a blood sample, Appellant was read the standard form chemical test warnings. In pertinent part, the trooper read to Appellant the following language:

"It is my duty as a police officer to inform you that if you refuse to

1 When a licensee appeals a license suspension under Section 1547(b) of the Code, DOT must establish that the driver was arrested for driving under the influence of alcohol, was requested to submit to a chemical test, refused to do so, and was specifically warned that refusal would result in his license being suspended. Once DOT establishes its prima facie case, the burden shifts to the driver to prove that he was not capable of making a knowing and conscious refusal to take the test. Commonwealth of Pennsylvania, Department of Transportation v. Gillespie, 635 A.2d 662 (Pa. Cmwlth. 1993). Appellant does not contend any failure on DOT's part to establish its prima facie case.

> submit to the chemical test your operating privilege will be suspended for at least one year. In addition, if you refuse to submit to a chemical test and are convicted of or plead to or are adjudicated delinquent with respect to a violation of 3802 of the Vehicle Code, because of your refusal you will be subject to the more severe penalties set forth in Section 3804(c) of the Vehicle Code, which includes a minimum of 72 hours in jail and a minimum fine of $1000."

Appellant contends the warning should have told him the minimum of one year suspension, 72 hours incarceration and $1000 fine applied if the referenced conviction was his first offense within the previous ten years, but that if it were a second or subsequent offense within the previous ten years, the penalties were significantly greater, and further, that if he did submit to testing and the results showed a blood alcohol content between .08% and .099%, he faced no additional license suspension, no period of incarceration, and a maximum fine of only $300. Appellant contends that without this additional information, he was not able to make a knowing and conscious decision whether to submit to chemical testing.

Section 1547(b)(2) requires the police officer to inform the person requested to submit to chemical testing that (1) his operating privilege will be suspended upon refusal, and (2) upon conviction, plea or adjudication of delinquency for violating section 3802(a), he will be subject to the penalties provided in section 3804(c). 75 Pa.C.S. Section 1547(b)(2). The warning read to Appellant in the instant case fully complied with this requirement, and in fact informed Appellant of all possible statutory consequences by use of the terms "at least" and "a minimum". Had Appellant expressed some concern regarding possible penalties other than the minimums and had the trooper been unable or unwilling to explain further, Appellant's argument his refusal was not "knowing" might carry more weight.[2] See, e.g. <u>Commonwealth of Pennsylvania, Department of Transportation v. Ingram</u>, 648 A.2d 285 (Pa. 1994) (informing the motorist that his right to counsel does not apply to chemical testing is sufficient to resolve any confusion the motorist may have about his right to counsel, thus giving him the tools necessary to make a knowing and conscious decision). His after-the-fact attempt to create confusion, however, where none seems to have existed at the time of the refusal, does not move

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2 The Court does not wish to imply, however, that had Appellant asked for further explanation and not received it, such would vitiate the knowing and conscious nature of his refusal, as those are not the facts of this case and the Court thus finds it unnecessary to make such a determination.

this Court to overturn the suspension.

Moreover, it appears that while being read the warnings, Appellant told the trooper that "he knows what his rights are and didn't want to hear what I had to say and what-not." N.T. at 26. He then refused to sign the form acknowledging the warning had been read to him. It is thus doubtful that any additional explanation of the consequences of refusal would have influenced the decision-making process herein.

Accordingly, the Court believes the appeal to be without merit, and respectfully suggests the Order of September 29, 2004, should be affirmed.

Dated: January 11, 2005 By The Court,

Dudley N. Anderson, Judge

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Hon. Dudley N. Anderson