

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH ,
Plaintiff

vs.

MICHAEL R. POLK,
Defendant

:
: No. 07-00746
:
: CRIMINAL DIVISION
:
:
: License Suspension

OPINION AND ORDER

Petitioner Michael R. Polk filed an appeal from a one-year license suspension imposed by Pennsylvania Department of Transportation for Petitioner's failure to submit to a blood alcohol test on February 4, 2007 after he was arrested for the criminal offense of driving under the influence of alcohol.

The issue raised by Petitioner in his license suspension appeal is whether he was incapable of making a knowing and conscious refusal to take the blood alcohol test.

In order to warrant a license suspension, the burden of proof is on the Bureau to prove that the licensee was arrested for driving under the influence, was requested to submit to chemical testing, that the licensee refused such testing and that the licensee was warned that a refusal would result in the suspension of his operating privileges. See Commonwealth v. Dailey, 722 A.2d 771, (Pa.Cmwlth. 1999).

The Court held a de novo hearing on June 12, 2007. At the hearing, the Bureau proved that on the evening of February 4, 2007, Petitioner was involved in an accident with a second vehicle. Petitioner was driving south on Route 15 through South Williamsport. A second vehicle traveling on West Mountain Avenue proceeded into the Route 15 intersection and collided with Petitioner's vehicle.

Cpl. Robert Hetner of the South Williamsport Police Department responded to

the accident scene. Petitioner claimed the second driver, a female, drove through a red light and impacted his vehicle. Petitioner was upset and the officer noticed his speech was slurred. He noticed Petitioner had balance problems. Petitioner was also argumentative. Cpl. Hetner noticed Petitioner had an odor of alcohol and when the officer asked him to submit to field sobriety test, Petitioner contended that the female driver was the one who should submit to such testing. Petitioner started to take one field test but did not complete the test. Petitioner admitted he had consumed alcohol that evening.

A tow truck driver arrived to tow the Polk vehicle. Petitioner accused Cpl. Hetner of receiving money from the tow truck operator for the Corporal calling him to the scene.

Cpl. Hetner arrested Petitioner for the offense of driving under the influence of alcohol and Petitioner was placed in his police cruiser and handcuffed. Petitioner argued that the female driver was the one who should be tested for driving under the influence.

Petitioner, while argumentative, was basically compliant with Cpl. Hetner. The officer told Petitioner he was going to transport him to the Williamsport Hospital for a blood alcohol test. Petitioner claimed the officer was arresting the wrong person. Petitioner was placed in custody and transported to the Williamsport Hospital. When the cruiser neared the hospital, Petitioner told the officer that because he was arresting the wrong person, he would not agree to the drawing of his blood for a blood alcohol test.

While at the hospital, Cpl. Hetner read Petitioner the appropriate warnings in regard to his taking the blood alcohol test. Petitioner again claimed he should not be the one at the hospital and that he did not like needles. When the lab technician came into the room Petitioner made a snide remark to the technician and refused to consent to the blood draw.

Petitioner refused to sign the chemical test form. See Commonwealth Exhibit 1, the Chemical Test Warning.

When asked to take the field tests, Cpl. Hetner acknowledged that Petitioner had told him he had been in South Africa and had been beaten up by the police there. Cpl. Hetner opined that that Petitioner understood the warnings, which he gave to him.

Cpl. Hetner transported Petitioner to the South Williamsport Police Station where Petitioner did perform some field tests. The officer then transported him to his apartment where Petitioner showed the officer some of the paintings he had made.

The Commonwealth also played for the Court part of a videotape of Petitioner, which was made in the officer's cruiser when Petitioner was being transported to the hospital Commonwealth Exhibit 2. The Court notes the videotape depicted Petitioner complaining that the female driver was the one who ran the red light and he was the one in handcuffs. Petitioner was being argumentative with the officer and often used the "F" word in his comments. For example, he said "you ought to f----- think about what you are doing." Petitioner also complained he had just purchased his car and it was towed away.

In observing the tape, the court noted Petitioner's speech was slurred and that he appeared to be under the influence of alcohol. While Petitioner was not violent or out-of-control, he was angry and argumentative with the officer often using the "F" word in his complaints. In watching the tape, the Court did not note a particular fear Petitioner was showing of the officer. Rather, his conduct appeared somewhat bold because he was argumentative and continued to use the "F" word in his comments to the officer.

Petitioner called Dr. Robert Dowell to testify. Dr. Dowell is a neuropsychologist employed by Evangelical Community Hospital.

Dr. Dowell first had contact with Petitioner sometime the year 2000. Petitioner had returned from South Africa and was in significant distress. Petitioner was with a missionary group in South Africa. Dr. Dowell believed Petitioner had suffered a severe beating from a police officer in South Africa, including head trauma. Dr. Dowell believed Petitioner suffered post concussive syndrome and post traumatic stress disorder.

After Petitioner returned from South Africa in 2000, he stayed in his room and would not go out. Dr. Dowell was contacted by Petitioner's mother and when he came to see Petitioner he talked to him through a closed door because Petitioner would not come out of his room.

Dr. Dowell next saw Petitioner in March 2007, after the events of the refusal to take the blood test on February 4, 1007, Petitioner described to Dr. Dowell his history from 2000 to the present. Petitioner described the severe beating he received at the hands of the South Africa police. Petitioner spent some time in a psychiatric hospital then returned to the United States. Upon his return to his mother's home, he stayed in his room for seven years before he was involved in the accident and events on February 4, 2007. Petitioner just started to come out of his shell a few months before the accident on February 4, 2007, and he had purchased his automobile shortly before the accident.

After the accident of February 4, 2007, Dr. Dowell opined that Petitioner experienced post concussive symptoms residual symptoms from his beating at the hands of the police in South Africa. He opined Petitioner showed clear features of post traumatic stress disorder. He explained that when someone has this disorder when under stress, an individual can go into a "fight or flight" response and when the individual cannot successfully do either they tend to "freeze". Dr. Dowell believes that an individual who

freezes is operating at a low level of functionality. Dr. Dowell opined that when Petitioner went into this state on February 4 his reasoning became flooded and he could not make a knowing and conscious decision about whether to consent to a blood test.

Dr. Dowell acknowledged drinking alcohol can worsen the fight or flight response.

Petitioner also testified. He described his history, including his missionary work in Hong Kong and South Africa. He described the incident in South Africa in 1999 when he was beaten by South African police. He described his depression problems after returning home. He testified he stayed in his room in his mother's house for years after returning home.

He describes having an awakening on December 10, 2006, where he became himself again. He described the accident of February 4, 2007. He had just moved into his own apartment in February, 2007. He had purchased his vehicle a week and one-half before the accident. He had gone to night club in Williamsport before the accident and drank two vodka and tonics. He testified the second driver ran a red light and caused the accident.

Petitioner claimed he was traumatized by the accident and, as soon as Cpl. Hetner approached him, he was "scared to death." He was asked to do field tests, but could not because of a brain injury. He told the officer about his South African experience.

When Petitioner got to the hospital and realized they wanted to use a needle to take his blood, he refused to consent to the blood draw.

Petitioner acknowledged he understood the blood test was to determine if he was intoxicated. When the Court asked Petitioner why he refused the test, he testified he had an aversion to needles because he had worked with heroin addicts and he felt this test was a

prelude to being killed by the officer.

Once the Bureau proved that Petitioner was arrested for DUI, was requested to submit to a chemical test, refused to take the test and was properly warned that this refusal would lead to the suspension of his driving privileges, the burden shifted to the Petitioner to prove that he was physically incapable of making a knowing conscious refusal to take the test. Dailey, supra, at 774.

If a motorist's refusal to take the test is caused in whole or in part by consumption of alcohol, the motorist affirmative defense fails. See Dailey, supra, at 774.

In looking at the videotape of Petitioner in the police cruiser after his arrest, the Court sees an individual who appears to be under the influence of alcohol. The Petitioner is argumentative, his speech appears slurred and he does not appear fearful at all of the officer. The Court does not believe Dr. Dowell, in his testimony, was able to eliminate the affects of alcohol on Petitioner's decision making process at the time in question.

Petitioner also explains his aversion to needles to explain why he would not consent to the test.

In Petitioner's testimony, he described Cpl. Hetner's behavior as mellow and quiet. It is difficult for the Court to believe that this incident in South Africa, which occurred approximately six (6) years before the events of February 4, 2007, was so controlling as to not allow the Petitioner to make a knowing and conscious decision to refuse to take the blood alcohol test.

For these reasons, the Court feels it is compelled to **DENY** this appeal.

ORDER

AND NOW, this ____ day of July 2007, the Court **DENIES** the Petitioner Michael Polk's appeal of his license suspension.

The Department of Transportation shall send Mr. Polk notice of the time and date that the one-year suspension will become effective.¹

By The Court,

Kenneth D. Brown,
President Judge

cc: Work file
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¹ At the hearing before the Court, Mr. Polk testified his present address was 325 Market Street, South Williamsport, Pennsylvania 17702