

JAMES D. GRASSMEYER, JR., : IN THE COURT OF COMMON PLEAS OF
: LYCOMING COUNTY, PENNSYLVANIA
:
vs. : NO. 12-01,661/ 12-01,857
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF TRANSPORTATION, :
BUREAU OF DRIVER LICENSING, :
Defendant : 1925(a) OPINION

Date: April 18, 2013

OPINION IN SUPPORT OF THE ORDER OF JANUARY 28, 2013, IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

James D. Grassmeyer, (hereinafter “Appellant”) has appealed this Court’s January 28, 2013 Order. After a de novo hearing held on January 28, 2013 this Court dismissed Appellant’s appeal of his license suspension and reinstated the eighteen (18) month license suspension. Simultaneously this Court dismissed Appellant’s appeal of the disqualification of his commercial driving privileges and reinstated the one year disqualification. Appellant filed his appeal on February 27, 2013 and the appeal is docketed to 271 CD 2013 and 270 CD 2013. This Opinion is submitted in regard to the pending appeal.

In Appellant’s Concise Statement of Matters Complained of on Appeal, filed March 25, 2013, Appellant raised the following issues:

1. Whether the Appellant’s confusion/refusal arose from statements made by the police officer.
2. Whether the Appellant’s refusal to submit to a chemical test of blood under the implied consent law was a knowing or conscious decision, given the officers conflicting and/or inconsistent statements.

Appellant's appeal should be denied and the Court's verdict affirmed.

I. FACTS AND PROCEDURAL HISTORY

On Monday, January 28, 2013 during a de novo hearing of *Grassmeyer v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Drivers Licensing* the following facts were determined to have occurred.

On the evening of June 27, 2012 at approximately 6 p.m. Officer Jeffrey Hughes, Jr., patrolman for the Old Lycoming Township Police Department, was dispatched to the scene of a hit and run vehicle accident involving a light blue pickup truck. As a result of responding to the scene Officer Hughes came into contact with the Appellant. Appellant was cooperative and explained that he had hit a mailbox and was leaving a note for the homeowners who were not home at the time. At that time three field sobriety tests were conducted.¹ At the conclusion of the field sobriety tests Officer Hughes then asked Appellant to submit to a breath test. Appellant attempted the breath test two or three times; the tests were inclusive due to insufficient air flow. Appellant was then placed under arrest for suspicion of Driving Under the Influence and was transported to the Williamsport Hospital Emergency Room for chemical blood testing.

After arriving at the Emergency Room and being placed in a private area, Officer Hughes read the DL-26 form paragraphs 1-4 verbatim to Appellant. Both Appellant and Officer Hughes signed the DL-26 form. Appellant asked Officer Hughes if he already submitted to a test and Officer Hughes replied no. Appellant asked Officer Hughes a second and third time didn't I already submit to a test and Officer Hughes replied no. Appellant refused to submit to a blood

¹ Details of what led to the field sobriety tests are missing due to a stipulation that the officer had reasonable grounds to believe Appellant was under the influence and that resulted in a lawful arrest. N.T., January 28, 2013, p. 8.

test due to the fact that he had already submitted to a breath test. For the fourth time Appellant asked Officer Hughes, did I already give a test and Officer Hughes replied yes you gave a breath test but now I am asking for a blood test. Appellant stated that he was not giving a blood test because he had already given a test. The hospital phlebotomist entered and Officer Hughes asked Appellant to submit to a chemical blood test; Appellant refused; the hospital staff signed resistance of blood draw; and no blood sample was drawn.

As a result of the events of that evening Appellant received notification from the Pennsylvania Department of Transportation dated July 18, 2012 that stated as a result of Appellant's violation of 75 Pa. C.S. § 1547, chemical test refusal, his driving privileges were being suspended for a period of eighteen (18) months as mandated by 75 Pa. C.S. § 1547 (b) (1) (ii). Appellant also received notification from the Pennsylvania Department of Transportation dated July 18, 2012 that stated as a result of Appellant's violation of 75 Pa. C.S. § 1547, chemical test refusal, his commercial driving privilege was being disqualified for a period of 1 year. On August 15, 2012 Appellant filed an Appeal from License Suspension appealing the eighteen (18) month suspension of his driving privileges and a separate Appeal from License Suspension appealing the one year disqualification of his commercial driving privilege as authorized by 75 Pa. C.S. § 1613. After a de novo hearing held on January 28, 2013 Appellant's appeal was dismissed and the suspension was reinstated. On February 27, 2013 Appellant filed appeal of this Court's January 28, 2013 finding.

II. DISCUSSION

In the review of a license suspension case the analysis is whether the factual findings of the trial court are supported by the evidence presented and whether there was an error of law or abuse of discretion committed by the trial court. *Sitoski v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 11 A.3d 12, 17 n.5 (Pa. Commw. Ct. 2010) (quoting *Nornhold v. Department of Transportation, Bureau of Driver Licensing*, 881 A.2d 59, 62 n.4 (Pa. Commw. Ct. 2005)).

The governing authority on license suspensions in relation to refusal to submit to a chemical blood test is 75 Pa. C.S. § 1547 which states:

Chemical testing to determine amount of alcohol or controlled substance.

(a) *General rule.* --Any person who drives, operates or is in actual physical control of the movement of a 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 vehicle:

(1) in violation of section 1543(b)(1.1) (relating to driving while operating privilege is suspended or revoked), 3802 (relating to driving under influence of alcohol or controlled substance) or 3808(a)(2) (relating to illegally operating a motor vehicle not equipped with ignition interlock); 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.

(b) *Suspension for refusal.*

(1) If any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person as follows:

(i) Except as set forth in subparagraph (ii), for a period of 12 months.

(ii) For a period of 18 months if any of the following apply:

(A) The person's operating privileges have previously been suspended under this subsection.

(B) The person has, prior to the refusal under this paragraph, been sentenced for:

(I) an offense under section 3802;

(II) an offense under former section 3731;

(III) an offense equivalent to an offense under subclause (I) or (II); or

(IV) a combination of the offenses set forth in this clause.

(2) It shall be the duty of the police officer to inform the person that:

(i) the person's operating privilege will be suspended upon refusal to submit to chemical testing; and

(ii) if the person refuses to submit to chemical testing, upon conviction or plea for violating section 3802(a)(1), the person will be subject to the penalties provided in section 3804(c) (relating to penalties).

(3) Any person whose operating privilege is suspended under the provisions of this section shall have the same right of appeal as provided for in cases of suspension for other reasons.

75 Pa. C.S. § 1547 (b) (2) is referred to as the implied consent law. *Martinovic v.*

Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver

Licensing, 881 A.2d 30, 36 (Pa. Commw. Ct. 2005).

To issue a . . . suspension of Licensee's operating privilege under *Section 1547 (b) (1)* of the Vehicle Code, the Department has the burden of proving that (1) Licensee was arrested for violating *Section 3802* of the Vehicle Code by a police officer who had "reasonable grounds to believe" that

Licensee was operating or was in actual physical control of the movement of a vehicle while in violation of *Section 3802* (i.e., while driving under the influence); (2) Licensee was asked to submit to a chemical test; (3) Licensee refused to do so; and (4) Licensee was specifically warned that a refusal would result in the suspension of his operating privileges and would result in enhanced penalties if he was later convicted of violating *Section 3802 (a)(1)*. Once that burden is met, the licensee has the burden to prove that (1) he was physically incapable of completing the breath test or (2) his refusal was not knowing and conscious.

Martinovic at 34 (citing *Department of Transportation, Bureau of Driver Licensing v. Boucher*, 547 Pa. 440, 691 A.2d 450 (1997)). At the time of the hearing Appellant stipulated that Officer Hughes had reasonable grounds to believe that Appellant was operating a vehicle while under the influence of alcohol and that led to a lawful arrest. N.T., January 28, 2013, p. 8. Appellant was asked to submit to a chemical test. N.T., January 28, 2013, p. 10, 11, 13, 17. Appellant was specifically warned that a refusal would result in the suspension of his operating privileges when Officer Hughes read verbatim the DL-26 form to Appellant. N.T., January 28, 2013, p. 10. The Department met its burden by proving each prong of the test. The burden then switches to the licensee to prove that he was incapable of completing the breath test or his refusal was not knowing and conscious. In this case the appellant argues that his refusal was not knowing or conscious.

Appellant argues that his refusal was not knowing or conscious due to his confusion based on conflicting statements made by Officer Hughes. On the evening in question, after being asked to submit to a chemical blood test Appellant asked Officer Hughes four times, didn't I already give a test. N.T., January 28, 2013, p. 17. Three of those four times Officer Hughes replied "no." N.T., January 28, 2013, p. 10-11. On the fourth occasion Officer Hughes replied "yes." N.T., January 28, 2013, p. 17. Appellant claims that final inconsistent answer of yes is

what led to his ultimate refusal and based on that conflicting statement his refusal was not knowing or conscious.

Whether the refusal was knowing or conscious is a factual determination that is made by the trial court. *Kollar v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 7 A.3d 336, 340 (Pa. Commw. Ct. 2010). Where there is sufficient evidence to support the finding of the trial court the findings must be affirmed. *Id.* In this case there was uncontested testimony that when Officer Hughes replied yes in response to the fourth time of being asked didn't I already give a test, he elaborated and explained "yes, you did take a breath test, a PBT, but I'm now asking you to submit to a blood test." N.T., January 28, 2013, p. 11. At that time Appellant then advised Officer Hughes that he did not want to take a blood test. *Id.* Furthermore, a hospital phlebotomist came in to administer the chemical blood test and again Appellant refused this test. N.T., January 28, 2013, p. 13. This is relevant for two reasons 1) the refusal and 2) when the preliminary breath test was conducted Officer Hughes conducted the test himself; the breath test did not require a third party which is a recognizable difference of the test. There is also the DL-26 form that had the word *blood* handwritten in and which was read verbatim to Appellant. N.T., January 28, 2013, p. 10, 19. Given the totality of the circumstances and all of the evidence presented it was clearly explained to Appellant that he was being asked to submit to a blood test. If there was any confusion on the part of Appellant it was not due to Officer Hughes. "If the motorist's inability to make a knowing and conscious refusal of testing is caused in whole or in part by consumption of alcohol, the licensee is precluded from meeting her burden as a matter of law." *Id.* (citing *DiGiovanni v. Department of Transportation, Bureau of Driver Licensing*, 717 A.2d 1125 (Pa. Cmmw. Ct. 1998)).

This case is analogous to *Ryan v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*. 823 A.2d 1101 (Pa. Commw. Ct. 2003). In *Ryan* the police officer administered two breath tests at the scene; placed the licensee under arrest for driving under the influence; and transported her to the hospital for a blood test. *Id.* at 1102-03. At the hospital licensee was read the DL-26 form and asked to submit to a chemical blood test. *Id.* at 1103. Licensee signed the DL-26 form and refused the blood test. *Id.* At the hearing she testified “I told him no because I was asking him why, like I took all the other tests and I didn’t know if that was really required because I agreed to both breathalyzers and the field tests.” *Id.* The Commonwealth Court reversed the trial court’s finding that licensee was confused over her responsibility to submit to the blood test at the hospital. *Ryan*. 823 A.2d 1103. The Commonwealth Court further held that “. . . any confusion as to the responsibility to submit to the second type of test arose not from statements made by the police officer but solely from Licensee’s ‘self-induced and self-destructive confusion about what the law is or should be.’” *Id.*

The same is true in this case, Appellant was aware that he was now being asked to submit to a blood test, he was read the warnings and he refused. “An officer’s sole duty is to inform motorists of the implied consent warnings; once they have done so, they have satisfied their obligation.” *Martinovic*, 881 A.2d 30, 35 (Pa. Commw. Ct. 2005) (citing *Department of Transportation, Bureau of Driver Licensing v. Scott*, 546 Pa. 241, 684 A.2d 539 (1996)).

CONCLUSION

The evidence supports the Court's factual determination that Appellant's refusal was knowing and conscious. Appellant knew he was being asked for a blood test; he knew that he had not already consented to a blood test; he was read the implied consent warnings; and he ultimately refused the blood test. There was no error of law or abuse of discretion committed by the Court.

Given the overwhelming evidence that Appellant's refusal was knowing and conscious the Court's verdict of January 28, 2013 should be affirmed and Appellant's appeal dismissed.

BY THE COURT,

Joy Reynolds McCoy, Judge

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