COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF TRANSPORTATION,	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
	:	
vs.	:	NO. 14-00101
	:	945 MDA 2014
ANDREW C. LYON	:	
Defendant	:	1925(a) OPINION

Date: August 1, 2014

OPINION IN SUPPORT OF THE ORDER OF APRIL 21, 2014 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

I. PROCEDURAL HISTORY

Andrew C. Lyon, (hereinafter "Appellant") has appealed this Court's April 21, 2014 Order. After a de novo hearing held on April 21, 2014 this Court dismissed Appellant's appeal of his license suspension and reinstated the twelve (12) month license suspension. No appeal was or has been taken of this Court's Order of April 21, 2014. Appellant filed a Motion to Reconsider on May 1, 2014. Appellant's Motion to Reconsider was denied by Order dated May 6, 2014 and filed May 7, 2014. Appellant filed an appeal of the Order of May 6, 2014 on June 4, 2014. This Opinion is submitted in regard to the pending appeal.

This appeal should be quashed. Appellant has appealed from the order denying his petition for reconsideration. Pennsylvania case law is absolutely clear that the refusal of a trial court to reconsider, rehear, or permit reargument of a final decree is not reviewable on appeal. ***City of Philadelphia v. Glim***, 149 Pa.Cmwlth. 491, 496 n. 1, 613 A.2d 613, 616 n. 1 (1992) ("the refusal of a trial court to reconsider an order is not reviewable on appeal. ... An appeal lies only

from the underlying order which the trial court refused to reconsider assuming arguendo that the underlying order is appealable under the rules of appellate procedure."); ***Prince George Center Inc. v. United States Gypsum Co.***, 704 A.2d 141, 145 (Pa.Super. 1997 ("this Court has no jurisdiction over a trial court's denial of a petition for reconsideration"); ***Rittenhouse v. Hank***s, 2001 PA Super 153, 777 A.2d 1113, 1116 n. 1 (Superior Court sua sponte quashed an appeal from the trial court's order denying reconsideration of a delay damages award); ***Valley Forge Center Associates v. Rib-It/K.P. Inc***., 693 A.2d 242, 246 n. 2 (Pa. Super. 1997) (quashing appeal).

Should the Court view the Appeal filed on June 4, 2014 as an appeal of this Court's final Order of April 21, 2014 this appeal should be dismissed as untimely filed because Appellant failed to file a notice of appeal within 30 days, as required by Pa. R. App. P. 903(a),

> " Appeal periods are jurisdictional and may not be extended as a matter of grace or mere indulgence; otherwise there would be no finality to judicial action. Statutory appeal periods evidence a legislative determination that the finality of court adjudications must be promoted by limiting the time within which they can be questioned on appeal. Where jurisdiction of the court has been lost because of the staleness of the complaint, the attractiveness of an argument on the merits is of no moment because the tribunal is without the power to grant the requested relief. Therefore, an appeal filed one day after the expiration of the statutory appeal period must be dismissed as untimely."

City of Philadelphia v. Tirrill, 906 A.2d 663, 665-66 (Pa. Cmwlth. Ct. 2006) (internal citations and quotations omitted).

Ultimately, this Court will address the issues of merit in event the appeal is not quashed or dismissed on procedural grounds.

In Appellant's Concise Statement of Matters Complained of on Appeal, filed June 24, 2014, Appellant raised the following issues:

1. The Trial Court erred in not granting Defendant's appeal of the Suspension of his license Operating Privilege, as the Defendant did not knowingly, willingly or intelligently refuse of blood testing.
2. The Trial Court erred in denying the Defendant's request for a continuance of his Suspension Appeal, as said denial resulted in denying the Defendant his right to representation by Counsel.

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

II. FACTS

On April 21, 2014 during a de novo hearing of ***Commonwealth of Pennsylvania, Department of Transportation v. Lyon*** the following facts were determined to have occurred.

In the early morning of November 28, 2013 at approximately 1:30 a.m. Trooper Farber, patrolman for the Pennsylvania State Police, was participating in a roving DUI patrol. During the roving DUI patrol, Trooper Farber observed a vehicle traveling at a high rate of speed. He observed the vehicle fail to stop at a stop sign and weave across both the center and fog line. The car was traveling between 70 and 75 miles per hour in an area with a posted speed limit of 55 miles per hour. As a result of these observations Officer Farber initiated a traffic stop and came into contact with the Appellant, the driver of the vehicle. Appellant appeared confused, had slurred speech and had bloodshot, glassy eyes. Trooper Farber smelled a strong odor of alcohol. Appellant admitted he had been drinking. The Appellant refused field sobriety tests and told Trooper Farber he preferred to just be taken for a blood test. Appellant was then placed under arrest for suspicion of Driving Under the Influence and was transported to the DUI Center for chemical blood testing.

After arriving at the DUI Center, Trooper Farber turned the Appellant over to Officer Kenneth Brown who read verbatim the DL-26 form, section 1547, the chemical testing warnings

paragraphs 1-4 to Appellant. Both Appellant and Officer Brown signed the DL-26 form. Appellant stated he did not understand the warnings. Officer Brown asked for Appellant's specific questions. The Appellant's questions focused on where the blood went following the testing. Officer Brown asked the Defendant if he were going to submit to blood testing Appellant refused. Appellant stated that Officer Brown would get nothing from him. Appellant did not contradict that Officer Brown read him his warning nor that he refused the blood test.

As a result of the events of that evening Appellant received notification from the Pennsylvania Department of Transportation dated December 10, 2013 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 twelve (12) months as mandated by 75 Pa. C.S. § 1547 (b) (1) (i). On January 14, 2014 Appellant filed an Appeal from License Suspension appealing the twelve (12) month suspension of his driving privileges. Appellant's appeal was dismissed and the suspension was reinstated. On June 4, 2014 Appellant filed appeal of this Court's May 6, 2014 denial of his Motion for Reconsideration.

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)). Trooper Farber had reasonable grounds to believe that Appellant was operating a vehicle while under the influence of alcohol and that led to a lawful arrest. ***See Hearing Transcript***, April 21, 2014, p. 6-9. Appellant was asked to submit to a chemical test. ***H. T.***, April 21, 2014, p. 16, 12-13. Appellant was specifically warned that a refusal would result in the suspension of his operating privileges when Officer Brown read verbatim the DL-26 form to Appellant. ***H. T.***, April 21, 2014, p. 14-15. 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 the Trial Court erred in not granting Defendant's appeal of the Suspension of his license Operating Privilege, as the Defendant did not knowingly, willingly or intelligently refuse of blood testing. Appellant argues that his refusal was not "knowing, willingly or intelligent". The standard considers only whether the refusal was knowing and conscious. The issue of whether the Appellant's decision was intelligent will not meet the licensee's burden.

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 Officer Brown gave and answered questions regarding the consequences of chemical test refusal. Appellant's sole concern was the "chain of command" or

custody of the blood sample. ***H. T.***, April 21, 2014, p. 28, 6-8. 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 Brown. "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).

"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)).

The Appellant's refusal was knowing and conscious. The Department met its burden and the Appellant failed to meet his burden to show the refusal was not knowing or conscious.

The decision to grant a continuance is a matter within the trial court's exclusive discretion and can be reversed only on a showing that the trial court abused its discretion. ***Commonwealth v. Lutz*****,** 618 A.2d 1254, 1255 (Pa. Cmwlth. 1992); ***Swoyer v. Department of Transportation***, 599 A.2d 710, 712 (Pa. Cmwlth. 1990). To establish an abuse of discretion, Licensee must show "not merely an error of judgment," but that "the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias, or ill will." ***Sitoski v. Department of Transportation, Bureau of Driver Licensing***, 11 A.3d 12, 22 (Pa. Cmwlth. 2010) (quoting *Shaw v. Township of Aston*, 919 A.2d 303 (Pa. Cmwlth. 2007)).

Appellant argues that the denial of his continuance request resulted in him being denied his right to representation of counsel. Appellant chose and was represented by counsel, who filed the initial appeal on January 14, 2014. Appellant was given notice of a hearing not to be held until April 21, 2014. Appellant had ample opportunity to consult with his attorney and if necessary seek other counsel. At the time of the hearing Appellant appeared and was represented by counsel. An attorney for the Department of Transportation appeared and was prepared to proceed on the Petition filed by the Appellant. Two police officers appeared for the hearing. Appellant's choice to fire his attorney at the time of trial deprived him of counsel. Attorney Hillman requested a continuance on behalf of Appellant due to Appellant's desire to "seek a second opinion". ***See Hearing Transcript***, April 21, 2014, p. 2, 15. The Attorney for the Commonwealth objected to a continuance citing the untimeliness of the request, the presence of witnesses, judicial economy, and the lack of meritorious argument. ***H.T.,*** April 21, 2014, p. 3, 2-11. The Court denied Attorney Hillman's request for a continuance. Attorney Hillman indicated the Appellant wished to proceed on his own behalf. ***H.T.,*** April 21, 2014, p. 4, 3-4. Appellant confirmed he wished to represent himself. ***H.T.,*** April 21, 2014, p. 4, 17. Appellant subsequently requested a continuance which was again denied by the Court. ***H.T.,*** April 21, 2014, p. 5, 6-8.

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 and that the Court's refusal to grant the continuance request lacked any abuse of discretion of the Court's verdict of April 21, 2014 should be affirmed and Appellant's appeal dismissed.

BY THE COURT,

Joy Reynolds McCoy, Judge