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**Ryan K. Dillow, Petitioner/Appellee vs. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing, Respondent/Appellant**

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Civil Action No. 2016-4331

## HEADNOTES

*Driver's License Suspension Appeal*

1. In order to sustain a suspension of a driver's license under 75 Pa.C.S. §1547(b)(1)(i) of the Vehicle Code, PennDOT has the burden of establishing that the licensee: (1) was arrested for a violation of 75 Pa.C.S. § 3802 (driving under the influence of alcohol or controlled substance) by a police officer with reasonable grounds to believe that the motorist was operating a motor vehicle while under the influence of alcohol and/or controlled substances; (2) was requested to submit to a chemical test; (3) refused to do so; and (4) was warned that refusal would result in a license suspension. *Regula v. Dep't of Transp., Bureau of Driver Licensing*, 146 A.3d 836 (Pa. Cmwlth. 2016).

2. The question of whether a licensee refuses to submit to a chemical test is a legal one subject to plenary review on appeal. *Boseman v. Dep't of Transp., Bureau of Driver Licensing*, 157 A.3d 10 (Pa. Cmwlth.), *appeal denied*, 170 A.3d 996 (Pa. 2017).

3. Once a police officer provides the implied consent warnings to a motorist, the officer has done all that is legally required to ensure the motorist is fully advised of the consequences of her failure to submit to chemical testing. *Dep't of Transp., Bureau of Driver Licensing v. Scott,* 546 Pa. 241, 684 A.2d 539 (1996); *Sitoski v. Dep't of Transp., Bureau of Driver Licensing*, 11 A.3d 12 (Pa. Cmwlth. 2010); *Martinovic v. Com. Dep't of Transp., Bureau of Driver Licensing*, 881 A.2d 30, 34–35 (Pa. Cmwlth. 2005).

4. Once PennDOT meets its burden, the burden shifts to the Petitioner to prove that he was not capable of making a knowing and conscious refusal to take the test or that he was physically unable to take the test. *Grogg v. Com., Dep't of Transp., Bureau of Driver Licensing*, 79 A.3d 715, 718 (Pa. Cmwlth. 2013), *judgment entered sub nom*; *Grogg v. Com., Dep't of Trans., Bureau of Driver Licensing.*, 69 A.3d 779 (Pa. Cmwlth. 2013).

5. This is a factual determination which is to be made by the trial court. *Com., Dep't of Transp., Bureau of Traffic Safety v. O'Connell*, 555 A.2d 873, 876 (Pa. 1989); *see also Grogg* 79 A.3d at 715, 718 (citing *Hudson v. Dep't of Transp., Bureau of Driver Licensing*, 830 A.2d 594, 599 (Pa. Cmwlth. 2003); *Dep't of Transp., Bureau of Traffic Safety v. Mumma*, 468 A.2d 891, 892 (Pa. Cmwlth. 1983)).

Appearances:

George H. Kabusk, Esq. *for Defendant*

Steven E. Kellis, Esq. *for Plaintiff*

**OPINION sur Pa. R. App. P. 1925(a)**

Before Sponseller, J.

This action was initiated on December, 7, 2016, by Mr. Dillow ("Petitioner") when he filed a *Petition for Appeal from the Order of Department of Transportation* seeking to have the Commonwealth of Pennsylvania's Department of Transportation's Bureau of Driving Licensing ("PennDOT") suspension rescinded. On December 12, 2016, the Court entered a Preliminary Order for Hearing staying Petitioner's driving license suspension pending the outcome of the appeal. At the de novo hearing, conducted on November 8, 2017, Petitioner was represented by Attorney Steven E. Kellis and PennDOT was represented by Attorney George H. Kabusk. The Court heard testimony, reviewed evidence and entered an *Order of Court* on December 7, 2017, sustaining the appeal and rescinding the Petitioner's license suspension. PennDOT filed a *Motion to Reconsider* on December 19, 2017, and this Court denied the Motion on December 21, 2017. PennDOT filed the Notice of Appeal on January, 5, 2018 and this Court issued its Order pursuant to Pa. R. App.1925(b) on January 12, 2018, and PennDOT filed thier Concise Statement on January 24, 2018.

The Court will now respond to PennDOT's claims of error in this Opinion and Order of Court pursuant to Pa.R.A.P. 1925(a).

**ISSUES RAISED**

PennDOT raises the following issue(s) in their Concise Statement:[1] (1) whether the Trial Court erred as a matter of law in sustaining Petitioner's statutory appeal.

For the reasons that follow we submit that no error was made by this Court.

**DISCUSSION**

PennDOT alleges that we erred in sustaining Petitioner's statutory appeal as Petitioner did not meet his standard of proof. This argument is without merit. In order to sustain a suspension of a driver's license under 75 Pa.C.S. §1547(b)(1)(i) of the Vehicle Code, PennDOT has the burden of establishing that the licensee: (1) was arrested for a violation of 75 Pa.C.S. § 3802 (driving under the influence of alcohol or controlled substance) by a police officer with reasonable grounds to believe that the motorist

1 Concise Statement of Errors Complained of on Appeal, 1/24/2018.

was operating a motor vehicle while under the influence of alcohol and/or controlled substances; (2) was requested to submit to a chemical test; (3) refused to do so; and (4) was warned that refusal would result in a license suspension. *Regula v. Dep't of Transp., Bureau of Driver Licensing*, 146 A.3d 836 (Pa. Cmwlth. 2016).

The question of whether a licensee refuses to submit to a chemical test is a legal one subject to plenary review on appeal. *Boseman v. Dep't of Transp., Bureau of Driver Licensing*, 157 A.3d 10 (Pa. Cmwlth.), appeal denied, 170 A.3d 996 (Pa. 2017). Once a police officer provides the implied consent warnings to a motorist, the officer has done all that is legally required to ensure the motorist is fully advised of the consequences of her failure to submit to chemical testing. *Dep't of Transp., Bureau of Driver Licensing v. Scott*, 546 Pa. 241, 684 A.2d 539 (1996); *Sitoski v. Dep't of Transp., Bureau of Driver Licensing*, 11 A.3d 12 (Pa. Cmwlth. 2010); *Martinovic v. Com. Dep't of Transp., Bureau of Driver Licensing*, 881 A.2d 30, 34–35 (Pa. Cmwlth. 2005)(In order to support a license suspension, it is well-settled law that an Officers' sole duty is to inform motorists, not ensure understanding, of the implied consent warnings).

Once PennDOT meets its burden, the burden shifts to the Petitioner to prove that he was not capable of making a knowing and conscious refusal to take the test or that he was physically unable to take the test. *Grogg v. Com., Dep't of Transp., Bureau of Driver Licensing*, 79 A.3d 715, 718 (Pa. Cmwlth. 2013), judgment entered sub nom; *Grogg v. Comm., Dep't of Trans., Bureau of Driver Lic.*, 69 A.3d 779 (Pa. Cmwlth. 2013). This is a factual determination which is to be made by the trial court. *Com., Dep't of Transp., Bureau of Traffic Safety v. O'Connell*, 555 A.2d 873, 876 (Pa. 1989); see also Grogg at 79 A.3d 715, 718 (citing *Hudson v. Dep't of Transp., Bureau of Driver Licensing*, 830 A.2d 594, 599 (Pa. Cmwlth. 2003); *Dep't of Transp., Bureau of Traffic Safety v. Mumma*, 468 A.2d 891, 892 (Pa. Cmwlth. 1983)).

Here, this Court finds that PennDOT did not meet its burden of establishing that Petitioner was requested to submit to the test and, in fact, refused the administration of the blood draw. The Trooper testified that he read the DL-26 form to the Petitioner twice, and gave the Petitioner the informed consent document to read the warning on his own, however this Court found, based on Petitioner's testimony, that Petitioner did not have time to read the document prior to the Trooper concluding that Petitioner refused. This Court did not hear any testimony that Petitioner was asked to submit to the test nor that he actually verbalized or demonstrated a refusal. However, this Court did hear credible testimony that the Petitioner stated he would consent to the administration of the test while still in the lab at

the Chambersburg Hospital, without ever being asked if he would consent. The Trooper deemed Petitioner to have refused the test when Petitioner responded that he was still reading and, it was at this moment that the Trooper deemed the Petitioner to have refused the test as he decided he could not wait any longer for the Petitioner to read the form. The Trooper testified that this entire exchange occurred over the very limited duration of four (4) minutes. It was Petitioner's response to the Trooper's question regarding whether he was finished reading the form that the Trooper determined to be Petitioner's ultimate act of refusal. At no point in time did this Court hear testimony that the Petitioner actually verbalized or exhibited any behavior to constitute a refusal. This Court only heard that it was the Petitioner's response that he was still reading a document, one of a foreign nature to himself, that was considered a refusal, and only because the Trooper could not wait any longer. Consequently, this Court did not find that Petitioner, in fact, refused to take the test.

Alternatively, Petitioner satisfied his burden that he was not capable of making a knowing and conscious refusal. Petitioner credibly testified that he was not from Pennsylvania as he was a resident of and domiciled in Florida, and therefore, was not familiar with Pennsylvania law. While the Petitioner was granted the request to read the form himself, he was not actually provided a meaningful opportunity to actually read the document in its entirety. Petitioner credibly testified that while he was actively attempting to read the document, the Trooper interrupted him, refused to answer any questions, and was overall very impatient. As mentioned above, no behavior was cited that exhibited any willful act to refuse the test on behalf of the Petitioner. Corroborating this finding of fact, this Court heard testimony that there was a mark mid-way down the provided DL-26 form around point three (3), not made by the Trooper and of which was not present prior to the Petitioner receiving the form. The Petitioner testified that he himself marked the form at this point when the Trooper interrupted him to ask if he was still reading. The Petitioner was never able to inform himself of the consequences of his perceived refusal nor was he ever informed that if he directly responded to the Trooper's question, which had nothing to do with refusing to take the test, that his direct answer in response could be perceived as a refusal. Therefore the Petitioner could not knowingly or consciously refuse as he was simply not provided with the opportunity to actually refuse.

While the Trooper testified that he read the informed consent form to the Petitioner, he also provided the form to the Petitioner to read for himself. Petitioner testified that he was not provided adequate time to actually read the lengthy document and was interrupted by the Trooper. Petitioner credibly testified that he never refused to take the test. The Trooper

also testified that the Petitioner never verbalized or acted in any manner to indicate a refusal beyond the Petitioner responding that he was still reading when asked if he was finished. This Court found Petitioner's testimony credible that he was unable give a knowingly and conscious refusal and was also not provided an opportunity to refuse. This finding was based in part on the Court's observation of the Trooper's demeanor at the time of the hearing. As such, Petitioner provided sufficient evidence that he was unable to knowingly and consciously refuse the chemical testing and did not, at any point, actually refuse the administration of the test. For these reasons, the appeal was sustained.

## CONCLUSION

In light of the foregoing discussion it is respectfully submitted that no errors were committed by this Court during the suspension appeal hearing. Therefore, this Court respectfully requests that the Commonwealth Court affirm the Court's Order.

## ORDER OF COURT

**AND NOW**, this 20th day of February, 2018, pursuant to Pennsylvania Rule of Appellate Procedure 1931(c),

**IT IS HEREBY ORDERED** that the Prothonotary of Franklin County shall promptly transmit to the Prothonotary of the Commonwealth Court the record in this matter, along with the attached Opinion sur Pa. R. App. P. 1925(a).

*Pursuant to the requirements of Pa. R. Civ. P. 236 (a)(2),(b) and (d), the Prothonotary shall give written notice of the entry of this Order of Court, including a copy of this Opinion and Order of Court, to each party's attorney of record and shall note in the docket the giving of such notice and the time and manner thereof..*