

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Malachy Orji a/b/a MC Iroko Auto	:	
Service Center - O.I.S. #BF85,	:	
Appellant	:	
	:	
v.	:	No. 153 C.D. 2013
	:	Submitted: August 9, 2013
Commonwealth of Pennsylvania,	:	
Department of Transportation	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: November 8, 2013

Malachy Orji a/b/a MC Iroko Auto Service Center – O.I.S. #BF85 (Orji) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court) that upheld the Pennsylvania Department of Transportation’s (PennDOT) permanent suspension of his Certificate of Appointment as an Emissions Inspection Station, and imposition of a \$5,000 fine pursuant to Section 4724 of the Vehicle Code, 75 Pa. C.S. §4724.¹ Orji argues the trial court erred in upholding his suspension because the charges of fraudulent and inaccurate record-keeping are not supported by substantial evidence. Orji also alleges bias by the trial court. Upon review, we affirm.

¹ Section 4724(a) of the Vehicle Code states “... [PennDOT] shall supervise and inspect official inspection stations and may suspend the certificate of appointment issued to a station ... which has violated or failed to comply with any of the provisions of this chapter or regulations adopted by [PennDOT].” 75 Pa. C.S. §4724(a).

I. Background

Orji was a licensed emissions inspection station, appointed to perform inspections by PennDOT pursuant to a Certificate of Appointment (Certificate). PennDOT permanently suspended his Certificate as an official emission inspection station and imposed the maximum fine of \$5,000. PennDOT found Orji improperly furnished a 5,000 mile emissions exempt sticker, indicating the vehicle traveled less than 5,000 miles since the prior emissions inspection, when the vehicle did not qualify. This entailed the lesser included offenses of improper and careless record-keeping. Orji appealed the emissions violations to the trial court.

The trial court held a de novo hearing. PennDOT presented the testimony of Miles Edwards, an officer of the Pennsylvania Emissions Team, and David Wolpert, a Quality Assurance Officer (QAO) with the Emissions Team. Officer Edwards testified regarding the inspection and testing, and his interaction with Orji's employee at the inspection station while he posed as a customer. QAO Wolpert testified regarding his investigation of the inspection station based on Officer Edwards' report, and his interaction with the owner of the station.

In the relevant timeframe, Officer Edwards was employed as an emissions inspector for 14 years; he served as a police officer in Philadelphia for 28 years before that. As a result of complaints, Officer Edwards visited the station in a covert capacity seeking inspections of a 2006 Infiniti G-35x with an emission modified to automatically fail an emissions test (Vehicle). Officer Edwards testified "the car was designed to fail the inspections." Reproduced Record (R.R.) at 16a.

When Officer Edwards arrived at the station, he told Orji's employee, an emissions technician (Employee), he needed an emissions test because the check engine light was on. He also requested a regular safety inspection. After the Vehicle was parked in the inspection bay, Officer Edwards maintained visual contact with it throughout the entire inspection. He observed Employee pop the hood, and briefly go into the vehicle before entering his office. No one put the Vehicle on a lift. Although the hood obstructed his view, Officer Edwards attests Employee never hooked the Vehicle to the analyzer to check emissions, as is necessary unless a vehicle is exempt from emissions testing.

The Vehicle had an emissions sticker for the prior year, indicating the mileage at the last inspection was 70,955. The odometer reading on the Vehicle before Officer Edwards brought it to the station was 76,809 miles. When the difference between the mileage at the last inspection and the current mileage is 5,000 or less, no inspection is required, and a vehicle is "exempt," meaning "you automatically get an exempt sticker." R.R. at 19a. In the instant matter, the difference in mileage was more than 5,000 miles, so this exemption did not apply.

After about 30 minutes, Employee emerged from his office with two stickers, one for a safety inspection and another for an emissions inspection based on the exemption for a differential of less than 5,000 miles. The sticker Employee furnished also falsely recorded the mileage of the Vehicle as 74,827 miles. R.R. at 97a. In addition, Officer Edwards testified the Vehicle would not have passed the emissions inspection test because the check engine light was on. Employee charged \$120, \$60 per inspection without providing a receipt. Officer Edwards

advised it is typical not to receive receipts for illegal inspections. When shown a purported receipt by Orji's counsel, Officer Edwards attested he never saw it before.

Before taking the Vehicle to the inspection station, Officer Edwards performed an emissions test and recorded the mileage on the Vehicle as 76,809. After visiting the station, Officer Edwards conducted an emissions inspection and recorded the mileage as 76,855 miles. Both times, the Vehicle failed the emissions inspection. Officer Edwards reported Orji sold a pair of inspection stickers that were improper and reflected false mileage.

QAO Wolpert testified he visited Orji's inspection station after receiving a report about the sale of the two inspection stickers to Officer Edwards. A QAO is "a title over officer;" his "duties are to inspect and audit all inspection stations related to safety and emissions testing." R.R. at 40a. QAO Wolpert investigated the report by speaking with Malachy Orji, the owner of the inspection station (Owner). QAO Wolpert asked Owner to show him the log books and the emissions analyzer that records the information for any emissions sticker issued, including 5,000 mile exempt stickers like the one issued here. Because Owner could not locate the log books at that time, and Employee was not on site during his visit, QAO Wolpert returned to the station and resumed his investigation the next day.

QAO Wolpert reviewed the log books and identified an emissions printout from the analyzer showing the exemption for the Vehicle and the entry of 74,827 as its mileage. He explained the technician (Employee) manually enters the mileage for purposes of the emissions sticker. Based on his investigation, QAO

Wolpert concluded Orji fraudulently furnished a set of stickers to Officer Edwards, including the falsified 5,000 mile exemption, and fraudulently recorded the Vehicle's mileage as 74,827 miles. QAO Wolpert also testified Orji committed seven prior violations since the station began emissions testing in 2006. R.R. at 45a.

Orji presented the testimony of Owner and Employee who sold the stickers to Officer Edwards. Owner's testimony focused upon the usual course of business performing inspections and his general supervision. Owner admitted he was not present at the time Employee performed the inspections at issue.

Employee's testimony conflicted with that of Officer Edwards in a number of material respects. Employee testified the mileage of the Vehicle was actually 74,827 miles according to the odometer, and thus within the 5,000 mile exemption. As a result, he provided an exempt sticker, and he did not perform an emissions test. Because he did not test the Vehicle's emissions, Employee attested he did not need to turn on the analyzer of emissions. Employee repeatedly testified Officer Edwards was not present throughout the inspection process. Rather, Officer Edwards was outside speaking with someone.

Also contrary to Officer Edwards' testimony, Employee testified he provided Officer Edwards a receipt for a single inspection, written to "Keith and Maureen" without any last name, for \$60. R.R. at 61a-62a. Employee noted the log book also listed the inspection for "Keith and Maureen" and acknowledged that the full name was listed for all other entries. His reason for not providing the last name on the receipt or in the log book was that he was "lazy." R.R. at 69a.

Toward the end of the hearing, there was some debate about whether certain evidence should be permitted that did not pertain to the emissions inspection. The trial court sought clarification regarding what proof existed as to the mileage at the time Employee attached the analyzer for emissions.² Orji's counsel represented the mileage was entered into a computer and would appear on a computer printout, but Orji did not offer the printout. R.R. at 76a.

The trial court credited PennDOT's witnesses' testimony over the conflicting testimony of Employee and upheld the permanent suspension of Orji's Certificate and the \$5,000 fine. Orji promptly requested a supersedeas, which the trial court denied.

Orji then filed a notice of appeal to this Court.³

II. Discussion

Orji argues the trial court erred in dismissing the appeal and reinstating suspension of the Certificate because the fraudulent record-keeping charge is not supported by substantial evidence. Orji claims the trial court also erred because the lesser offenses of improper record-keeping and careless record-keeping are not supported by substantial evidence. In addition, Orji contends the trial court showed bias against it during the trial.

² The trial court noted the mileage on the Covert Audit Form Officer Edwards completed (R.R. at 92a) appeared altered, as the number after 7 could have been a 4, a 6 or a 9, meaning 76,827 or 74,827. R.R. at 80a.

³ Our review in an inspection certificate suspension case is limited to determining whether the trial court committed an error of law or whether its factual findings are supported by substantial evidence. McCarthy v. Dep't of Transp., 7 A.3d 346 (Pa. Cmwlth. 2010).

The trial court's role in an inspection certificate appeal is limited "solely to a de novo determination of whether the person charged with the violation has indeed committed the violation for which the sanction was imposed." Snyder v. Com., Dep't of Transp., Bureau of Motor Vehicles, 970 A.2d 523, 527 (Pa. 2007) (quoting Dep't of Transp., Bureau of Traffic Safety v. Verna, 351 A.2d 694, 695 (Pa. Cmwlth. 1976)). Matters of witness credibility are exclusively within the province of the trial court. Firestone Tire & Serv. Ctr., O.I.S. #798 v. Dep't of Transp., 871 A.2d 863 (Pa. Cmwlth. 2005).

A. Emission Violations

Section 4724 of the Vehicle Code provides suspension and penalties for "furnish[ing], lend[ing], giv[ing], sell[ing] or receiv[ing] a certificate of emission inspection without inspection, including the lesser offenses of faulty inspection of equipment or parts and improper inspection." 75 Pa. C.S. §4724. Pursuant to emission inspection regulations, a station owner is responsible for any emission inspection violations committed by an employee. 67 Pa. Code §177.42. The regulations thus impose strict liability on station owners for an employee's violations. McCarthy v. Dep't of Transp., 7 A.3d 346 (Pa. Cmwlth. 2010).

Here, PennDOT charged Orji with the maximum penalty of permanent suspension and \$5,000 fine for a second offense. See 67 Pa. Code §177.602. Specifically, PennDOT charged Orji with the violation of selling an emissions sticker when no inspection was performed. Orji also wrote the wrong mileage on the emissions sticker, and issued an exempt emissions sticker when the Vehicle did not qualify for exemption.

Regarding penalties, Section 177.602(a) of the regulations provides:

(a) *Schedule of penalties.* The complete operation of an official emission inspection station shall be the responsibility of the owner. Failure to comply with the appropriate provisions of the Vehicle Code or this chapter will be considered sufficient cause for suspension of emission inspection privileges.

67 Pa. Code §177.602(a).

Orji contends the trial court erred in finding substantial evidence for the fraudulent record keeping violation.⁴ In its brief, PennDOT contends the violation of fraudulent record keeping is not the violation here appealed, and thus it has no obligation to prove that violation. Appellee's Br. at 13. PennDOT clarifies that the violation was selling the emissions sticker without conducting an inspection, for which there is substantial evidence.

This case is unusual in that there is no dispute that Orji did not conduct an emissions inspection. See Appellant's Br. at 16 (citing R.R. at 27a, 45a). Employee admits he did not turn on the analyzer, explaining he did not need to do so because the vehicle was exempt. R.R. at 73a. As a matter of law, Orji is strictly liable for Employee's violations. McCarthy. The dispute involves whether an emissions inspection was necessary under the circumstances.

⁴ Although PennDOT's initial notice of hearing listed fraudulent record keeping as a separate offense, thus putting Orji on notice, that violation is not listed in PennDOT's order of fine and suspension here appealed. R.R. at 86a. Further, "fraudulent recordkeeping" requires only that a record keeping entry is "not in accordance with fact." 67 Pa. Code §177.601. Contrary to Orji's arguments, the regulation does not require false intent. McCarthy.

The material question is one of fact: whether the Vehicle qualified as exempt from emissions testing, or required an emissions inspection because it exceeded the 5,000 mile criterion for an exemption. Employee claimed the mileage on the vehicle when it entered the station was 74,827, whereas PennDOT's witnesses credibly testified the mileage was recorded immediately before and after the false inspection as 76,809 miles and 76,855 miles respectively. The Station Investigation Report Officer Edwards completed the day of the inspection states the mileage was 76,827 at the time of inspection, not 74,827. R.R. at 93a.

Essentially, Orji asserts its witnesses were more credible than those of PennDOT. Orji argues Officer Edwards should have taken a photograph of the odometer to prove the actual mileage at the time of inspection, and asks this Court to find facts and make an adverse inference from his failure to do so. We decline.

The trial court credited PennDOT's witnesses and concluded the Vehicle required an inspection because of the greater than 5,000 miles traveled since the prior inspection. The trial court also specified "[t]he Court did not credit [Orji's] witnesses to the effect that the mileage was actually 74,827 miles." Tr. Ct. Op., 3/27/13, at 2. Questions of witness credibility cannot be re-tried on appeal. Firestone; Tropeck v. Com., Dep't of Transp., Bureau of Motor Vehicles, 847 A.2d 208 (Pa. 2004); Dep't of Transp., Bureau of Traffic Safety v. Karzenoski, 508 A.2d 618 (Pa. Cmwlth. 1986).

Moreover, consistent documentation reporting the mileage as over 76,000 miles corroborated the testimony of PennDOT's investigators. R.R. 90a, 93a, 95a, 96a. There is ample evidence supporting the mileage differential as greater than 5,000 miles since the prior inspection.

Pursuant to the regulations, the Vehicle should have been inspected for emissions and hooked up to the analyzer. Employee admits he did not hook the Vehicle up to the analyzer. R.R. at 73a. The uncontradicted testimony reflects the Vehicle was designed to fail inspection because the check engine light was on. R.R. at 18a. The emissions inspections Officer Edwards performed before and after visiting Orji show the Vehicle failed. Rather than fail the Vehicle, the record establishes Orji issued an exempt sticker. As a result of Orji's issuance of the exempt sticker, a vehicle that should have failed inspection was approved for travel.

The trial court's conclusion that Orji improperly furnished a 5,000 mile emissions exempt inspection sticker to the Vehicle is supported by substantial evidence. The evidence also shows Orji should have performed an inspection, and that if Orji had performed the inspection, the Vehicle would have failed. The trial court thus committed no error in upholding the penalties PennDOT imposed.

B. Bias

Lastly, Orji asserts the trial court showed bias during the hearing. At one point when counsel referred to a document that he could not produce, the trial court stated: "What a shock." R.R. at 76a.

However, the trial court explained in its opinion that it found counsel's tactic of referring to documents not in evidence as frustrating. In context, the trial court was responding to counsel after he represented the mileage was entered as 74,827 miles into a computer and would appear on a computer printout. The trial court requested Orji to produce the documents to which counsel referred. R.R. at 75a ("Let's see the documents.") After counsel stated Orji did not have the printout there, the trial judge made her comment.

The comment, "What a shock," does not clearly show prejudice or bias. Dennis v. Se. Pa. Transp. Auth., 833 A.2d 348 (Pa. Cmwlth. 2003) (trial judge's comments in negligence action that action was not a malpractice case against former counsel did not show bias). Moreover, the trial judge did not engage in emotionally charged personal or bitter commentary, and her comments were not personally derogatory; in context, her comment revealed exasperation, not bias. Corbin v. Cowan, 716 A.2d 614 (Pa. Super. 1998) (intemperate or exasperated comment at conduct of case does not demonstrate partiality or bias). Accordingly, we conclude there is no showing of bias here.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order regarding suspension and imposition of penalties. The allegations of bias by the trial court are insufficient to overcome the substantial evidence in support of its order.

ROBERT SIMPSON, Judge

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v. : No. 153 C.D. 2013
 :
Commonwealth of Pennsylvania, :
Department of Transportation :

ORDER

AND NOW, this 8th day of November, 2013, the January 7, 2013
Order of the Court of Common Pleas of Philadelphia County is hereby
AFFIRMED.

ROBERT SIMPSON, Judge