

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel Brian Hargrove, :
Appellant :
v. :
Commonwealth of Pennsylvania, :
Department of Transportation, : No. 894 C.D. 2014
Bureau of Driver Licensing : Submitted: December 26, 2014

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: February 2, 2015

Daniel Brian Hargrove (Hargrove) appeals from an order of the Court of Common Pleas of Allegheny County’s Summary Appeals Division (trial court) upholding the Department of Transportation’s (Department) eighteen-month suspension of his driving privileges for refusing a chemical test pursuant to 75 Pa. C.S. §1547(b). For the reasons that follow, we affirm the trial court’s order.

I.

Hargrove, a licensed attorney, appealed the Department’s suspension of his driver’s license pursuant to 75 Pa. C.S. §1547(b)(1)(ii),¹ contending that it was

¹ 75 Pa. C.S. §1547(b)(1)(ii) sets forth the following penalties regarding a driver or operator of a motor vehicle who refuses to consent to chemical testing to determine his alcohol content:
(Footnote continued on next page...)

premised upon his unlawful arrest for suspicion of driving under the influence of alcohol (DUI) and his refusal to submit to chemical breath testing which he did not refuse.²

(continued...)

(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:

* * *

(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.

75 Pa. C.S. §1547(b)(1)(ii).

² Hargrove filed a petition for appeal and supersedeas *nunc pro tunc* with the trial court, claiming that he never received a written notice of the Department's suspension of his driver's license but only learned of the suspension when a colleague advised him after expiration of the appeal period. The trial court permitted the appeal and granted supersedeas.

II.

At a *de novo* hearing before the trial court, the Department presented the testimony of Christian Guzzo, a patrol officer with the McCandless Police Department, who stated that at about 11:44 p.m. on August 14, 2012, he received a radio transmission from another officer advising that a “smart car” approaching northbound on Perry Highway was travelling very slowly with its high beams on. He testified that he observed the vehicle travelling slowly through a construction zone reduced to one lane in each direction, with a line of four or five vehicles behind it, and that oncoming vehicles were flashing their high beams at the subject vehicle, which dimmed its lights approximately 200 feet before it reached Officer Guzzo’s position. He explained that he flagged the vehicle to stop and approached it, at which time he identified Hargrove as the operator while waiting for Officer Todd Ray to arrive.³ Regarding Hargrove’s physical condition, Officer Guzzo recalled that his speech was slurred and that he had a moderate odor of alcohol about his person. When Officer Ray arrived, Officer Guzzo resumed his post. According to Officer Guzzo, Hargrove never informed him that he was a diabetic or that he was taking medication for diabetes.

On cross-examination, Officer Guzzo admitted that when he observed Hargrove approaching, the vehicle remained in its proper lane of traffic and that it was travelling through a construction zone with a 25 miles-per-hour speed limit, but estimated Hargrove’s rate of speed to be about 10 miles-per-hour. He denied the possibility of mistaking the high beams for fog lights but stated that he was unfamiliar with the lighting systems in smart cars. Officer Guzzo acknowledged that

³ Officer Guzzo was working an overtime detail while Officer Ray was actually on duty.

during his training, he learned that diabetics whose sugar levels are too high or too low may emit a fruity-smelling odor and may appear confused, but stated that he never personally observed such circumstances. Further, he explained that during diabetic episodes, diabetics may experience balancing issues, stumbling and swaying. Officer Guzzo did not ask Hargrove if he had been drinking or if he was on any medication and conceded that upon request, Hargrove provided his license without fumbling.

Officer Guzzo stated that at the end of his shift, he returned to the police station and drafted a supplemental report regarding the incident. Before he left the station, he recalled that Hargrove arrived, and although Officer Guzzo left before Hargrove, he subsequently learned that Officer Snyder, an off-duty McCandless police officer, drove Hargrove home from the station.

The Department also presented the testimony of Officer Ray, who stated that after receiving a dispatch, he reported to the scene where Officer Guzzo was waiting. He explained that when he approached Hargrove's vehicle, Hargrove exhibited signs that he was under the influence, specifically bloodshot eyes, slurred speech and a moderate odor of alcohol emitting from his breath. Officer Ray stated that he asked Hargrove to perform a field sobriety test but that Hargrove declined. After Hargrove refused to exit his vehicle, Officer Ray called the shift supervisor who reported to the scene, and in the meantime, Officer Mike Cheberenchick also arrived. When the supervisor arrived, Hargrove unsteadily stepped outside his vehicle and advised that he underwent recent surgery on both of his shoulders and had hardware installed in his ankle. As such, Officer Ray testified that he requested Hargrove to

recite the alphabet, and that Hargrove recited until the letter “Q,” at which point the letters became jumbled and Hargrove stopped his effort.

Officer Ray further explained that based upon Hargrove’s unsteadiness and his inability to recite the alphabet, the officers concluded there was sufficient evidence to perform a breathalyzer test, so Hargrove was taken into custody for suspected DUI, and Officer Ray transported him to the station to perform the test. After arriving at the station, Officer Ray stated that he read the following warnings, verbatim, to Hargrove:

1. You are under arrest for driving under the influence of alcohol or a controlled substance in violation of Section 3802 of the Vehicle Code.
2. I am requesting that you submit to a chemical test of breath.
3. If you refuse to submit to the chemical test, your operating privilege will be suspended for at least 12 months. If you previously refused a chemical test or were previously convicted of driving under the influence, you will be suspended for up to 18 months. In addition, if you refuse to submit to the chemical test, and you are convicted of violating Section 3802(a)(1) (relating to impaired driving) of the Vehicle Code, then, because of your refusal, you will be subject to more severe penalties set forth in Section 3804(c) (relating to penalties) of the Vehicle Code. **These are the same penalties that would be imposed if you were convicted of driving with the highest rate of alcohol, which include a minimum of 72 consecutive hours in jail** and a minimum fine of \$1,000.00, up to a maximum of five years in jail and a maximum fine of \$10,000.00.
4. You have no right to speak with an attorney or anyone else before deciding whether to submit to testing. If you request to speak with an attorney or anyone else after being

provided these warnings or you remain silent when asked to submit to chemical testing, you will have refused the test.

(Certified Record [C.R.], DL-26, “Chemical Testing Warnings and Report of Refusal to Submit to Chemical Testing as Authorized by Section 1547 of the Vehicle Code in Violation of Section 3802.”)

According to Officer Ray, upon administration of the warnings, Hargrove stated that he did not understand the question, but when asked to specify which question he did not understand, Hargrove remained silent. Officer Ray proceeded to re-read the warnings several times, but each time Hargrove stated that he did not understand. Officer Ray further testified that when asked if he would submit to chemical testing, Hargrove sat in silence or began discussing unrelated personal matters. After advising Hargrove that his silence would be deemed a refusal and after unsuccessfully attempting for ten minutes to secure an answer from Hargrove, Officer Ray concluded that Hargrove did not consent to the testing and allowed him to make a phone call to arrange transportation to get home. Subsequently, Officer Ray observed Hargrove using a nitro spray but did not exhibit any signs of a medical emergency. Regarding Hargrove’s mental state, Officer Ray testified that Hargrove seemed to be cognizant, continually referring to various officers by their first names and discussing personal matters.

During cross-examination, Officer Ray acknowledged that he had prior cases against Hargrove, a licensed defense attorney, and knew that Hargrove had run for magistrate judge against Officer Mike Heinel. He further conceded that during discussions with Hargrove regarding his transportation home, Officer Heinel’s name was brought up, but he denied being a part of that conversation.

Regarding the initial stop, Officer Ray did not recall Hargrove informing him that he had diabetes but he was advised that Hargrove had suffered three strokes. He testified that when he asked Hargrove if he was taking any medications, Hargrove only informed him of the pump spray. He did admit that diabetics may exhibit signs synonymous with intoxication and may emit a fruity smell. Officer Ray also recalled the presence of an insulin pen on Hargrove's person.

Officer Ray did ask Hargrove whether he had been drinking that night and agreed that generally, he would want to know the answer to this question, but he noted that he could not recall Hargrove's response, and the response was not indicated in his report. He stated that Hargrove may have requested a chemical test on his blood rather than on his breath, but if so, recalled that this was done only after his failure to consent was already deemed a refusal. Office Ray acknowledged being aware of provisions in the Vehicle Code pursuant to which an officer should honor an arrestee's request to have his blood rather than his breath tested, where reasonably practical to do so.

Further, Officer Cheberenchick testified on behalf of the Department, corroborating Officer Ray's testimony and explaining that he reported to the traffic stop as a back-up unit, was informed that Hargrove refused to exit his vehicle, and called for a supervisor. He stated that after the supervisor arrived and spoke to Hargrove, Hargrove exited his vehicle, stumbling, and the on-scene officers reached out to steady him. He also recalled a fairly strong odor of alcohol emanating from Hargrove's person. He explained that Hargrove declined to perform a series of field sobriety tests, claiming that a physical condition prevented him from doing so, but

that Hargrove attempted to recite the alphabet, jumbling some of the letters, after which Hargrove was taken into custody for suspected DUI.

Officer Cheberenchick testified that after Hargrove was taken into custody and transported to the police station, Officer Ray read the chemical-testing warnings one through four to Hargrove verbatim. He recalled that Hargrove repeatedly demanded that he enter the interview room with Hargrove and Officer Ray, but that he declined because the room was too small and he could adequately observe the proceedings from outside the room. He explained that in response to Officer Ray's requests that Hargrove submit to chemical testing, Hargrove repeatedly stated that he did not understand the chemical test, and Officer Ray repeatedly re-read the warnings. After this discussion continued for ten to fifteen minutes, Officer Ray informed Hargrove that a "yes" or "no" answer was required, but Officer Cheberenchick stated that Hargrove declined to provide one, choosing to remain silent even after being warned that his silence would be deemed a refusal. Additionally, Officer Cheberenchick stated that Hargrove never informed the officers that he was a diabetic or that he was taking medication for diabetes but acknowledged that diabetics may emit a fruity smell of alcohol as per his training.

In support of the appeal, Hargrove testified that on the evening in question, he attended three night-court cases and did not consume any alcohol because his medication, Lyrica, cannot be taken with alcohol. He further explained that he is an insulin-dependent diabetic who has sustained three heart attacks and three strokes, which causes him to have slurred speech and balance problems. He stated that on his way home, he drove through a 25-mile-per-hour construction zone at approximately 19 miles-per-hour, explaining that he thought there may have been

an accident due to the police presence in the zone. He conceded that other motorists often flash their high beams at him, signaling him to turn off his high beams, not realizing that he only has on his low beams because they are so bright.

Hargrove stated that after he was pulled over, he informed Officer Ray about all of his injuries, including his history of diabetes and strokes, the installation of hardware in his left ankle, the rebuilding of his left knee, and two surgeries on each shoulder. He explained that Officer Ray never asked him if he had been drinking that night and placed him under arrest without explanation and without inspecting his headlights. He further stated that at the police station, his right hand was handcuffed to the wall, but that with his left hand, he used a small bottle of nitro spray generally kept in his pocket which was prescribed to him for chest pressure, after which Officer Ray advised him that he would have to wait another 20 minutes for chemical testing. Hargrove claimed that in response, he stretched out his left arm and asked that his blood be tested. He stated that he asked Officer Cheberenchick to come into the room to be a witness but that he refused. In the interview room, Hargrove testified that he was never given the chemical-testing warnings, was not asked to sign the DL-26 form acknowledging administration of the warnings, and was never even advised as to the reason for his arrest. According to Hargrove, he never declined a chemical-breath test.

He testified that at the station, he was told to get a ride home and when he stated that he lived alone, one of the officers suggested Hargrove contact Officer Heinel, his former opponent in the race for district judge who was a police officer. Instead, Hargrove contacted an off-duty officer who knew that Hargrove was diabetic.

Hargrove recalled that when he arrived home, he checked his blood sugar which was over 600 milligrams per deciliter, with the normal range being between 70 to 130 milligrams per deciliter. He explained that at 600 milligrams per deciliter, he was in ketoacidosis, at which point diabetics experience signs synonymous with intoxication: trouble with speech and gait, agitation and confusion.

On cross-examination, Hargrove conceded that he did not advise the officers at the station that he was experiencing chest pain before using his nitro spray. He stated that he did not recall specifically being asked to submit to a breathalyzer but admitted repeatedly claiming that he was confused because he did not understand the basis for his arrest.

III.

Following the hearing, the trial court dismissed the appeal, finding the officers' testimony to be credible and consistent. Specifically, the trial court determined that although Hargrove did not expressly refuse a chemical test, his behavior was tantamount to a refusal because when asked to consent, he sat in silence or discussed personal matters, ignoring the question. As such, the trial court ruled that Hargrove's conduct and language "was clearly not the unqualified and unequivocal consent required by *Cunningham* [*v. Department of Transportation*, 525 A.2d 9, 10 (Pa. Cmwlth. 1987)]." (7/17/14 Trial Court Opinion at 5.) Regarding Hargrove's argument that he offered to submit to a blood test, the trial court first rejected this testimony as contradictory to the officers' testimony and regardless, explained that "a refusal to take a chemical test is not vitiated by a subsequent consent." (*Id.* at 6.) Concluding that Hargrove's conduct constituted a refusal under

75 Pa. C.S. §1547(b), the trial court dismissed Hargrove’s appeal and the instant appeal followed.⁴

IV.

On appeal,⁵ Hargrove first contends that the trial court erred in finding that Hargrove refused chemical testing, asserting that he requested blood testing which the Department refused despite its knowledge regarding Hargrove’s medical conditions. In so arguing, Hargrove essentially invites us to adopt his version of the events over that offered by the Department and to substitute the trial court’s credibility determinations with our own. However, as we have stated time and time again, “[t]he law is well settled that determinations as to the credibility of witnesses and the weight assigned to their testimony are solely within the province of the fact-finder” and are properly resolved by the trial court. *McGee v. Department of Transportation, Bureau of Driver Licensing*, 803 A.2d 255, 258 (Pa. Cmwlth. 2002).

⁴ The trial court granted Hargrove supersedeas pending disposition of his appeal to this Court.

⁵ Our review in license suspensions cases is limited to determining whether the trial court’s findings are supported by competent evidence, whether errors of law were committed, or whether the trial court committed an abuse of discretion in making its determination. *Gregro v. Department of Transportation, Bureau of Driver Licensing*, 987 A.2d 1264, 1267 n.2 (Pa. Cmwlth. 2010). In cases where the Department suspends a driver’s license for refusal to submit to chemical testing, the Department must prove: 1) that the licensee was placed under arrest for driving under the influence of alcohol by a police officer who had reasonable grounds to believe that he was operating or was in actual physical control of the movement of the vehicle while under the influence of alcohol; 2) that he was requested to submit to chemical testing; 3) that he was informed that a refusal to submit to such testing would result in a suspension of his operating privileges; and 4) that the licensee refused to submit to the test. *Id.* at 1267 n.3.

Based on the officers' testimony, which the trial court credited, the trial court's finding that Hargrove refused chemical breath testing is supported by competent evidence of record. Specifically, Officer Ray testified that when asked to provide his consent for testing, Hargrove repeatedly stated that he did not understand, ignored the question, attempted to discuss personal matters, and eventually sat in silence, even when advised his silence would be deemed a refusal. Officer Cheberenchick's statement that Hargrove sat in silence when asked to provide a "yes" or "no" answer regarding testing also corroborates Officer Ray's testimony.

Further, the trial court's finding that Hargrove did not request a blood test is supported by the officers' credible testimony to the contrary. Moreover, as the trial court noted, even if such a test was requested, such a request was made only after Hargrove's silence was deemed a refusal as per Officer Ray's testimony and, therefore, it did not vitiate Hargrove's refusal to take the breath test. *See Department of Transportation, Bureau of Driver Licensing v. Mease*, 610 A.2d 76, 78–79 (Pa. Cmwlth. 1991) (explaining that it is the police officer administering the test and not the driver subject to the test who chooses between blood, breath and urine chemical tests, and evidence that a driver offered to submit to one type of test after refusing to take another is irrelevant to whether he refused the test).⁶

⁶ Because the trial court did not err in finding that Hargrove did not request a chemical blood test, it likewise did not err in failing to address the applicability of 75 Pa. C.S. §1547(i) to the alleged request.

Accordingly, because competent evidence of record supports the trial court's finding that Hargrove refused to consent to chemical breath testing, its decision dismissing Hargrove's appeal is affirmed.

DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel Brian Hargrove,	:
Appellant	:
	:
v.	:
	:
Commonwealth of Pennsylvania,	:
Department of Transportation,	:
Bureau of Driver Licensing	: No. 894 C.D. 2014

ORDER

AND NOW, this 2nd day of February, 2015, the order of the Court of Common Pleas of Allegheny County, Summary Appeals Division, in the above-captioned matter, is affirmed.

DAN PELLEGRINI, President Judge