IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

ROBERT WARD,	:	
Plaintiff	:	
	:	
v.	:	No. 98-01,454
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA DEPARTMENT OF	:	
TRANSPORTATION,	:	
Defendant	:	1925(a) Opinion

O P I N I O N
Issued Pursuant to Pa. R.A.P. 1925(a)

This is an appeal from this court's order of 9 November 1998, dismissing Robert Ward's petition for appeal from the Department of Transportation's suspension of his driver's license privileges. That order was entered after a full hearing, where the evidence clearly established that Robert Ward knowingly and consciously refused to submit to a blood test.

Findings of Fact

The Department of Transportation introduced into evidence a videotape of Mr. Ward's alleged refusal, which was viewed by the court at the hearing. The tape showed the arresting officer reading Mr. Ward his Miranda rights and then explaining that these rights do not apply to chemical testing under the implied consent law. The officer explicitly told Mr. Ward that he did not have the right to consult an attorney or anyone else before deciding whether to take the blood test, that he did not have the right to remain silent when

asked to take the test, and that his continued requests to speak to a lawyer or anyone else when asked to submit to a chemical test would be considered a refusal and would result in the suspension of his driver's license for one year.

Mr. Ward then told the officer he wanted to talk to someone before deciding to take the test, whereupon the officer asked him if Mr. Ward understood what had just been explained to him. Mr. Ward answered, "I'm not sure sir, that's why I would really rather talk to someone first." The officer again told Mr. Ward that he did not have that right. Mr. Ward responded by saying, "Then I don't think I want to." When the officer said "you realize that you refusing your driver's license will be suspended . . . " Mr. Ward interrupted him and finished his sentence by saying "for one year." The officer then told Mr. Ward he would still be charged with Driving Under the Influence, and asked him, "Do you understand?" whereupon Mr. Ward answered, "No sir, I don't realize this. I do not understand why I could not make a phone call." The officer told him he could make the call only after he was processed, and that his continued request to make the call before the blood is drawn would be considered a refusal. Mr. Ward then said that he was "not sure of all the laws you're citing," and the officer explained again that he did not have a right to speak with anyone before making a decision to submit to the blood test, that he must make that decision on his own, and that if he refused his driver's license would automatically be suspended. He then asked, "Do you understand that?" Mr. Ward answered, "Yes." The officer asked, "Do you still refuse to let the lab tech draw blood?" Mr. Ward responded, "Before I talked to somebody, yes."

At the hearing, Trooper Chad E. Aldenderfer testified that after this last refusal he

processed Mr. Ward, which took approximately fifteen minutes. Mr. Ward then telephoned his father, who arrived in about 30 minutes. Mr. Ward's father took him out of the station but the two men returned about five minutes later, saying that Mr. Ward would submit to the blood test. Trooper Aldenderfer told them it was too late. Subsequently, Mr. Ward's license was suspended.

Discussion

Mr. Ward raises two issues in his Concise Statement of Matters Complained of on Appeal: (1) whether his refusal to take the blood test was knowing and conscious, and (2) whether his subsequent agreement to take the test vitiates his refusal.

I. Knowing and Conscious Refusal

A. *Mental Disability*

Pennsylvania's implied consent law provides for the automatic one-year suspension of an individual's driver's license when he or she refuses to submit to chemical testing to determine blood-alcohol content. 75 Pa.C.S. § 1547(b). When such a suspension is challenged in the Court of Common Pleas the Department of Transportation must establish that the driver: (1) was arrested for driving under the influence of alcohol; (2) was asked to submit to chemical testing for intoxication; (3) refused to submit to the test; and (4) was specifically warned that refusal would result in revocation of his driver's license. Ostermeyer v. Com, Dept. of Transp., _____ Pa. Cmwlth. _____, 703 A.2d 1075 (1997). At the hearing held on 9 November 1998 counsel stipulated that all the elements had been

met. The only issue for the court to decide was whether Mr. Ward made a knowing and conscious refusal.

Once the Department of Transportation has established the above four factors, it is the driver's responsibility to prove he was not capable of making a knowing and conscious refusal to take the test. Id. at 1077. Whether the driver has satisfied this burden is a factual determination for the trial court to decide. Department of Transportation, Bureau of Driver Licensing v. Grass, 141 Pa. Cmwlth. 455, 595 A.2d 789 (1991).

Mr. Ward has not presented sufficient evidence to convince this court that his refusal was not knowing and conscious. It is well settled that a driver's self-serving testimony that he was incapable of giving a valid refusal to take the blood test is not sufficient to meet his burden of proof.[1] Expert testimony, while not a per se requirement, is generally necessary in order to validate his testimony unless severe, incapacitating injuries are obvious. Id. See also Gombar v. Com., Dept. of Transportation, Bureau of Driver Licensing, _____ Pa. Cmwlth. _____, 678 A.2d 843 (1996).

Mr. Ward presented no expert testimony regarding his mental ability. The only witness he called was his father, who testified his son had a learning disability and was placed in special education classes in school. He described Mr. Ward as "a little retarded." This testimony, even if true, does not establish that Mr. Ward's refusal was not knowing and conscious. The mental disability described by his father cannot reasonably be construed as rendering Mr. Ward incapable of understanding the consequences of his refusal to take the blood test. In fact, his father testified that Mr. Ward graduated from high

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[1] The court notes that Mr. Ward did not testify himself but instead called his father, whose testimony was similarly self-serving.

school. A person capable of completing the requirements for a high school diploma—even in today's educational system—is certainly capable of knowingly refusing a blood test.

Mr. Ward's case is not even as compelling as the motorist in Com., Dept. of Transportation v. Peck, 132 Pa. Cmwlth. 509, 573 A.2d 645 (1990). In that case, the driver presented the testimony of a Ph.D. psychologist who had performed an evaluation and found that Mr. Peck had a "mixed learning ability, a generalized anxiety reaction and a dependent personality" which caused his thinking to break down in stressful situations. The psychologist stated that Mr. Peck functioned at the level of an 11 year old. Id. at 646. The trial court found the evidence to be credible and convincing, and concluded that these psychological problems prevented Mr. Peck from making a knowing and conscious refusal to submit to the blood test. However, the Commonwealth Court held that there was not competent evidence to support this conclusion. It pointed out that the psychologist did not testify that Mr. Peck's learning disability prevented him *in this case* from knowingly and consciously refusing. Id. at 647. Testimony regarding a general mental deficiency was simply not enough. This exact same criticism applies to Mr. Ward.

The Commonwealth Court also discussed the presumption that a licensed driver is sufficiently knowledgeable to fulfill the certification requirements that go with such licensing, which are found in 75 Pa. C.S. § 1547(b). Peck, supra, at 647-48. The court stated:

> We believe that this presumption places a further burden on the driver who claims intellectual immaturity as a defense to admitted driving while intoxicated. His lack of intellectual maturity should not provide a basis to disregard the driving rules.

It is reasonable to apply this same presumption to a driver claiming intellectual immaturity as a defense to a license suspension. Mr. Ward was duly licensed by the Commonwealth. If

he was capable of fulfilling the requirements to obtain a license, he certainly is capable of understanding the repeated explanations given to him regarding implied consent.

Finally, the court notes that far from supporting Mr. Ward's claim of inability to refuse the blood test, the evidence bolsters the conclusion that he knowingly and consciously refused. Although the tape reveals that Mr. Ward made some statements indicating that he did not understand the officer's explanation, the evidence captured on the tape clearly shows that he did in fact understand. The officer explained everything to Mr. Ward several times. He explicitly stated that Mr. Ward had no right to make a phone call before being processed and that if he refused to take the test his license would be suspended for one year. The officer also stated that his continued request to make a phone call first would be considered a refusal. After several such explanations, the officer asked Mr. Ward if he understood, and Mr. Ward answered "Yes." Moreover, even before this acknowledgment Mr. Ward demonstrated that he understood the consequences of his refusal when he completed the officer's sentence with "for one year" when the officer stated his license would be suspended. Mr. Ward's father also testified that Mr. Ward had previously consented and submitted to a blood test, which supports this court's conclusion that the refusal was valid.

B. *O'Connell Confusion*

The wording of Mr. Ward's Concise Statement of Matters Complained of on Appeal causes this court to suspect that Mr. Ward intends to argue that his refusal was invalid under Dept. of Transportation, Bureau of Traffic Safety v. O'Connell, 521 Pa. 242,

555 A.2d 873 (1989). In that case, the Supreme Court held that when an arrestee asks to speak to or call an attorney or anyone else when requested to take a breathalyzer test[2] the police must instruct the arrestee that such rights are inapplicable to the breathalyzer test and that the arrestee has no right to consult with an attorney or anyone else prior to taking the test. The Supreme Court explained that such a precaution is necessary to avoid confusion that might result when an arrestee is given Miranda warnings and then asked to submit to a breathalyzer test.

Any argument Mr. Ward might present on this issue must fail for two reasons. First, the tape reveals that the officer did everything legally required and more to dispel any confusion over Miranda's application to blood tests. Secondly, Mr. Ward has not even attempted to convince this court that he believed Miranda applied to a blood test. He presented no testimony indicating that he thought Miranda applied. See Com., Dept. of Transportation v. Tomczak, 132 Pa. Cmwlth. 38, 571 A.2d 1104 (1990). Moreover, Mr. Ward never asked for an attorney. While he did request to make a phone call, he was repeatedly told that he had no right to make that call. Most importantly, the tape shows that Mr. Ward acknowledged understanding that he had no right to make the call.[3]

Mr. Ward's case is similar to the driver in Tomczak. In that case, the Commonwealth Court held that the driver's refusal was due to a confusion about the consequences of his refusal, and did not fall within the O'Connell type refusal. The court stated, "[W]e refuse to extend O'Connell to every situation where the licensee, even

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[2] This standard also applies to a chemical test as in the instant case.

[3] For instance, when the officer told Mr. Ward he had no right to make the call, Mr. Ward answered, "Then I don't think I want to." [Take the blood test.]

legitimately, says that he is confused." Id. at 1107.[4]

II Subsequent Agreement to Take the Test

Mr. Ward also contends that this court should not have concluded that he failed to submit to the test because he changed his mind within one or two minutes after being released and was not permitted to take the test at that time. The obvious insinuation is that such a small amount of time makes little difference to the blood alcohol level in his system, and therefore the test would not have been skewed due to the delay. This argument must fail for two reasons.

First, the relevant period of time is not how long it took Mr. Ward to return after being released, but how much time had elapsed from his refusal until he changed his mind. Trooper Aldenderfer estimated this time to be thirty to forty-five minutes,[5] and the court finds this testimony to be completely credible.

Moreover, Pennsylvania case law is very clear that once a driver refuses to take the test his subsequent consent does not vitiate his refusal. For instance, in Cunningham v.

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[4] The case before the court is easily distinguished from Commonwealth v. McFadden, 522 Pa. 100, 559 A.2d 924 (1989), in which the Supreme Court held that the driver did not make a knowing and conscious refusal. The driver in that case was informed of his Miranda rights and was then asked to take a breathalyzer test. After refusing, the driver asked to make a phone call. The police permitted him to make the call, but recorded a refusal. The Supreme Court held that under O'Connell the police had a duty to inform the driver that Miranda did not apply to the breathalyzer test and that he had no right to make a phone call before submitting to the test. In the case before this court, however, the police clearly performed their duty.

[5] Trooper Aldenderfer testified that after Mr. Ward refused to take the test it took an additional fifteen minutes to complete processing. After that, Mr. Ward called his father, who arrived within half an hour. Five minutes after Mr. Ward left with his father, the two men returned and informed him that Mr. Ward was willing to take the test.

Department of Transportation, 105 Pa. Cmwlth. 501, 525 A.2d 9 (1987), the driver refused and then changed her mind five minutes later. The Commonwealth Court refused to modify the rule to include a consideration of the length of time in which the change of mind occurred. The court stated that "police officers are not required to . . . spend time waiting to see if the defendant will ultimately change his mind." Id. at 10, quoting Miller Appeal, 70 Pa. Cmwlth. 648, 650, 470 A.2d 213, 214 (1984).

Conclusion

For the reasons stated in this opinion, the court affirms its order of of 9 November 1998, dismissing Robert Ward's petition for appeal from the Department of Transportation's suspension of his driver's license privileges.

BY THE COURT,

Clinton W. Smith, P.J.

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