IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Robert Lowell Polishuk, Appellant | : | |
| v. | : | |
| Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing, | : | No. 2034 C.D. 2008 |
| Robert Lowell Polishuk, Appellant | : | |
| v. | : | |
| Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing, | : | No. 2137 C.D. 2008<br>Submitted: May 22, 2009 |

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: June 24, 2009

Robert Polishuk (Licensee) appeals the September 26, 2008 order of the Court of Common Pleas of Delaware County (trial court) denying Licensee's appeals of the suspension of his commercial drivers' license (CDL) and driver's license for driving under the influence (DUI) pursuant to Section 1613(d.1) of the Vehicle Code, 75 Pa.C.S. § 1613(d.1) (related to disqualification of commercial motor vehicle drivers for refusal to submit to DUI testing) and Section 1547(b) of the Vehicle Code,

75 Pa.C.S. § 1547(b) (related to suspension for refusal to submit to DUI testing).[1] The only issue in this case is whether the Department of Transportation (PennDOT) met its burden of proving that Licensee was properly warned that his refusal to submit to chemical testing would result in the suspension of his licenses. For the following reasons, we affirm the decisions of the trial court.

Licensee was arrested on November 21, 2007 for DUI. At the time of the arrest, Licensee had a valid Pennsylvania driver's license, as well as a CDL. He was taken by Trooper Jason Sperazza to the local hospital where he was asked to submit to chemical testing by blood. Trooper Sperazza read the required implied consent form warnings verbatim from the DL-26 Form.[2] Licensee refused to submit to testing.

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[1] There is a separate notice and appeal for each license type, but the cases were consolidated by this Court on December 8, 2008.

[2] The June 2005 DL-26 Form warnings state:

1. Please be advised that you are under arrest for driving under the influence of alcohol or controlled substance in violation of Section 3802 of the Vehicle Code.
2. I am requesting that you submit to a chemical test of _____ (blood, breath or urine. Officer chooses the chemical test).
3. It is my duty as a police officer to inform you that if you refuse to submit to the chemical test, your operating privileges will be suspended for at least 12 months, and up to 18 months, if you have prior refusals or have been previously sentenced for driving under the influence. In addition, if you refuse to submit to the chemical test, and you are convicted of or plead to violating Section 3802(a)(1) (relating to impaired driving) of the Vehicle Code, because of your refusal, you will be subject to the more severe penalties set forth in Section 3804(c) (relating to penalties) of the Vehicle Code, the same as if you would be 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.
4. It is also my duty as a police officer to inform you that you have no right to speak with an attorney or anyone else before deciding whether to submit to testing and any request to speak with an attorney or anyone else after being provided these warnings or remaining silent when asked to submit to chemical testing will constitute a refusal, resulting in the suspension of your operating privileges and

By two letters dated May 1, 2008, Licensee was notified that his driver's license and CDL were being suspended for 18 months and 12 months, respectively. Licensee timely appealed both suspensions to the trial court, which held an appeals hearing on September 3, 2008. While Licensee was present at the hearing, he did not testify. Trooper Sperazza did testify at the hearing. PennDOT admitted into evidence, without objection, proof of Licensee's 1992 conviction for DUI. Licensee based his defense on this Court's decision in *Yourick v. Dep't of Transp., Bureau of Driver Licensing*, (No. 2280 C.D. 2007, filed July 23, 2008) (*Yourick I*). On September 5, 2008, this Court entered an order granting the application for the reargument of *Yourick I* before the Court en banc, and withdrew the July 23, 2008 opinion. As a result, the trial court denied Licensee's appeals.

Licensee timely appealed the trial court's denials to this Court,[3] and requested an extension for filing briefs pending the outcome of the *Yourick I* reargument. On February 4, 2009, this Court reversed *Yourick I*. *See Yourick v. Dep't of Transp., Bureau of Driver Licensing*, 965 A.2d 341 (Pa. Cmwlth. 2009) (*Yourick II*).

Licensee argues that PennDOT did not meet its burden of proof because the DL-26 Form was not sufficient to specifically warn him that his refusal would result in revocation of his driver's license. Licensee argues that, since the language used by Trooper Sperazza in the present case was identical to the language used by the trooper in *Yourick*, the cases should have the same outcome. Further, Licensee

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> other enhanced criminal sanctions if you are convicted of violating Section 3802(a) of the Vehicle Code.

[3] Our review is limited to determining whether the trial court committed an error of law or abused its discretion, and whether necessary findings of fact were supported by substantial evidence. *Reinhart v. Dep't of Transp., Bureau of Driver Licensing*, 946 A.2d 167 (Pa. Cmwlth. 2008).

argues that, since *Yourick II* is on appeal to the Pennsylvania Supreme Court, the present case cannot be decided at this time by this Court. Finally, Licensee argues that the dissent in *Yourick II* is the correct interpretation of the law.

In order to uphold a suspension pursuant to Section 1547(b) of the Vehicle Code, PennDOT must prove that:

> 1) the licensee was arrested for violating Section 3802[4]; 2) by a police officer who had reasonable grounds to believe that the licensee was operating a vehicle while in violation of Section 3802; 3) that the licensee was requested to submit to a chemical test; 4) that the licensee refused to do so; and 5) that the police officer fulfilled the duty imposed by 75 Pa.C.S. § 1547(b)(2) by advising the licensee that his operating privileges would be suspended if he refused to submit to chemical testing and that, in the event the licensee pleaded guilty or *nolo contendere* to or was found guilty of violating 75 Pa.C.S. § 3802(a)(1) after refusing testing, the licensee would be subject to the penalties set forth in 75 Pa.C.S. § 3804(c).

*Quick v. Dep't of Transp., Bureau of Driver Licensing*, 915 A.2d 1268, 1271 (Pa. Cmwlth. 2007). In the suspension of a CDL, the arresting officer has to have reasonable grounds to believe a licensee was DUI, the licensee was arrested for DUI, the licensee was warned that refusal to submit to chemical testing would result in the suspension of his/her CDL, and he/she refused to be tested. 75 Pa.C.S. § 1613.

Since *Yourick II* has not been overturned by the Supreme Court, it is still controlling law in this case.[5] In *Yourick II*, the licensee argued that, based on her interpretation of the third paragraph of the DL-26 Form, since she did not have any prior chemical test refusals or DUI convictions, her operating privileges would not be

[4] 75 Pa.C.S. § 3802.

[5] Licensee indicates in his brief that the present case cannot be decided until the result of the *Yourick II* appeal is known; however, Licensee has filed no application in this Court to suspend appellate proceedings in this matter pending the outcome in *Yourick II*.

suspended, so she refused chemical testing. This Court found that the DL-26 Form was "sufficient as a matter of law to meet the warning requirement under Vehicle Code Section 1547(b), and that it appropriately apprised Yourick that her license would be suspended if she refused chemical testing . . . ." *Yourick II*, 965 A.2d at 345. Further, this Court stated:

> The Pennsylvania Supreme Court affirmed this Court's holding that a warning is legally sufficient if it informs the licensee that refusing a request for chemical testing means that he/she "will be in violation of the law and will be penalized for that violation." *Dep't of Transp., Bureau of Driver Licensing v. Weaver*, 590 Pa. 188, 191, 912 A.2d 259, 261 (2006), citing *Weaver v. Dep't of Transp., Bureau of Driver Licensing*, 873 A.2d 1, 3 (Pa. Cmwlth. 2005).
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> . . . .
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> We hold that this warning sufficiently apprises the driver hearing and/or reading it that, if he/she refuses to submit to the chemical test, his/her operating privileges "will be suspended." That a particular motorist hearing the warning may question its interpretation is not a sufficient basis upon which to state that the refusal was not knowing and conscious. . . . Further, we find it is unreasonable for a driver, whose operating privileges were granted subject to his/her implied consent to submit to chemical testing where there is reasonable cause to believe a licensee is driving under the influence of alcohol, to believe that there would not be a penalty for failure to submit to that testing.

*Id.* (Footnote omitted).

There is no dispute that Trooper Sperazza had reasonable grounds for stopping Licensee for DUI, that Licensee was arrested for DUI, nor that Licensee was asked to submit to chemical testing, which he refused. Reproduced Record (R.R.) at 39a. Trooper Sperazza testified that he read the DL-26 Form verbatim to Licensee

one time, then explained to him multiple times in laymen's terms to help him understand. R.R. at 45a. There is no requirement that an officer read the DL-26 Form more than once, or try to explain in any other manner what the warnings mean. It is enough to read the DL-26 Form to the licensee in its entirety, which Trooper Sperazza did. *Yourick II*. In addition, Licensee did not testify or indicate in any way that he did not understand or was confused about the consequences of his refusal. Consistent with the decision in *Yourick II*, reading the DL-26 Form one time to Licensee was sufficient as a matter of law to meet the warning requirements under Vehicle Code Section 1547(b). Therefore, PennDOT met its burden of proof.

Moreover, this case is distinguishable from *Yourick II* in that there is no suggestion here that Licensee's refusal to submit to testing was based upon a misunderstanding of the provisions of the DL-26 Form as was argued in *Yourick II*. There, the licensee did not have any prior convictions for DUI or prior refusals to submit to chemical testing, and she interpreted that the DL-26 Form's warnings did not apply to her for this reason. In the present case, Licensee cannot claim that he misinterpreted the provisions of the DL-26 Form in the same manner given his 1992 arrest for DUI. Under these circumstances, the provisions of the DL-26 Form clearly intend that Licensee's licenses were subject to suspension as a result of his November 21, 1992 DUI. Therefore, PennDOT met its burden of proof both under *Yourick II* and independent of *Yourick II*.

For the reasons stated, the trial court's decision is affirmed.

JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 24th day of June, 2009, the September 26, 2008 order of the Court of Common Pleas of Delaware County is affirmed.

JOHNNY J. BUTLER, Judge