IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Francis Bonner,	:	
Appellant	:	
	:	
v.	:	No. 2022 C.D. 2013
	:	Submitted: June 13, 2014
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: October 1, 2014**

Appellant Francis Bonner (Licensee) appeals from an order of the Court of Common Pleas of Montgomery County (trial court). The trial court denied Licensee's statutory appeal of the suspension of Licensee's driving privileges by the Department of Transportation, Bureau of Driver Licensing (DOT). DOT issued a notice suspending Licensee's operating privileges under Section 1547(b)(1)(i) of the Vehicle Code (Code)[1] based upon his refusal to submit to chemical testing. We affirm the trial court's order.

[1] 75 Pa. C.S. § 1547(b)(1)(i). Section 1547(b)(1)(i) of the Code provides that if any person who is arrested for driving under the influence of alcohol "is requested to submit to chemical testing and refuses to do so . . . the department shall suspend the operating privileges of the person . . . for a period of 12 months." This provision is commonly known as the Implied Consent Law.

On November 11, 2011, Lower Merion Township Police Officer Paul Colletta arrested Licensee and charged him with driving under the influence of alcohol. On December 15, 2011, DOT sent a notice of suspension to Licensee, informing him that his driving privileges were suspended for a one (1)-year period as a result of his refusal to submit to chemical testing following his arrest. Licensee filed a statutory appeal of the suspension notice, and the trial court conducted a hearing on October 7, 2013.

During the hearing, DOT introduced testimony of Officer Colletta. Officer Colletta testified that on November 11, 2011, at 10:56 p.m., he was monitoring traffic using a speed-timing device. (R.R. at 10a.) He heard Licensee's vehicle coming at a high rate of speed, and he determined that Licensee was traveling 67.5 miles per hour in a 25 mile-per-hour zone. (R.R. at 10a.) Officer Colletta testified that he began following Licensee and observed him run a red light and swerve between lanes. (R.R. at 11a.) Officer Colletta turned on his lights and siren, and eventually Licensee stopped his car. (*Id.*) When Officer Colletta approached the car and began talking to Licensee, he detected a strong odor of an alcoholic beverage coming from the car and from Licensee's breath. (*Id.*) Officer Colletta observed that Licensee's "eyes were bloodshot. His blinking was slow. His speech was slurred." (*Id.*)

Officer Colletta further testified that when a back-up officer arrived, Officer Colletta asked Licensee to exit the vehicle and take two standardized field sobriety tests, and Licensee agreed. (R.R. at 11a-12a.) Officer Colletta observed that Licensee had a tear in his pants, and Licensee told him that he fell while leaving a bar. (R.R. at 12a.) He stated that he asked Licensee to lift his pant leg, and he observed an abrasion on Licensee's knee. (*Id.*) Officer Colletta asked

Licensee if there was any physical reason that he was incapable of taking the tests, and Licensee said that there was not. (R.R. at 13a.) He observed that Licensee had no other visible wounds on his body. (R.R. at 16a.) Officer Colletta testified on cross-examination that he then explained and demonstrated the tests to Licensee, but Licensee was unable to successfully complete either test. (R.R. at 35a.) Officer Colletta then placed Licensee under arrest for driving under the influence of alcohol. (R.R. at 13a-14a.)

Officer Colletta testified that upon arrival to the police headquarters, he read Licensee, verbatim, what are known as the DL-26 Chemical Testing Warnings and asked him to take a breath test. (R.R. at 14a.) He stated that Licensee asked, "What do you think I should do?" (R.R. at 15a.) Officer Colletta explained that he could not offer any advice, but that there would be enhanced penalties for a failure to take the test. (*Id.*) He said that Licensee refused to take the test. (*Id.*)

On direct-examination, Licensee testified that on November 11, 2011, he left an alumni dinner at around 10:00 p.m. (R.R. at 44a.) He stated that he had two beers at dinner. (R.R. at 45a.) Licensee testified that as he was leaving the dinner, he was looking at his phone while walking, and he fell while trying to navigate construction on the sidewalk. (R.R. at 46a-47a.) He explained that he had just gotten off crutches for a foot injury that he sustained during the summer. (R.R. at 46a-47a.) Licensee said that after the fall, he woke up in the street with head, wrist, and knee pain. (R.R. at 47a.) He noted that he had no recollection of being taken to the police station. (*Id.*) Licensee testified that he went to the emergency room the following morning. (R.R. at 52a.) He stated that when he went to the hospital, he complained of a headache, knee pain, and wrist pain, and

that, to his understanding, he had a concussion. (R.R. at 53a.) Licensee testified that he saw another doctor, Daniel J. Kane, M.D., on November 14, 2011, regarding his concussion. (R.R. at 55a.) Licensee stated that he had symptoms of the concussion for about two weeks following the fall. (*Id.*) He described his symptoms as: "Intermittent headaches, trouble sleeping, light sensitivity, can't read, try to read more than a paragraph or two, it would be difficult. Sensitive to noise. It's not pleasant." (R.R. at 55a-56a.)

On cross-examination, Licensee testified that he did not remember getting into his car that night. (R.R. at 58a.) He also claimed that he did not remember speaking to Officer Colletta that evening. (R.R. at 60a.) When asked about his signature on the DL-26 form, which acknowledged his refusal to submit to testing, Licensee did say "yeah," he "was able to sign [the] form that evening." (R.R. at 67a.)

Licensee called Albert David Sydney, M.D., to testify on his behalf. After going over Dr. Sydney's background information relating to his practice and familiarity with brain injuries, Dr. Sydney testified about his relationship with Licensee. (R.R. at 72a-76a.) Dr. Sydney testified that he knew Licensee as a patient and that he saw him in 2012 concerning a concussion. (R.R. at 76a.) He testified that he wrote a report relating to Licensee's concussion, which Licensee's counsel marked as P-1. (*Id.*) Dr. Sydney explained that in forming his opinion relating to this case, he relied on Licensee's word and the records from the hospital, which stated that Licensee had a concussion. (R.R. at 76a-77a.) Dr. Sydney opined that, based on the information he was given, Licensee's symptoms were consistent with a concussion. (R.R. at 78a-79a.) Dr. Sydney testified that he thought the concussion was "mainly responsible" for Licensee's

confusion or inability to "make a knowing and conscious decision concerning a chemical test." (R.R. at 80a.) He characterized the concussion as the "primary reason" for Licensee's refusal. (R.R. at 81a.) He further testified that he thought that "most likely [Licensee] had a concussion and it's the concussion that's responsible for the behavior and, in particular, cutting to the chase, for his refusal to give consent at the time." (R.R. at 82a.) On cross-examination, however, when DOT's counsel asked Dr. Sydney whether alcohol also could have been the cause of Licensee's behavior, he answered, "I tend to doubt it based on what I have tried to tell you. It could be but I tend to doubt it." (R.R. at 86a.)

By order dated October 11, 2013, the trial court denied Licensee's appeal and reinstated the suspension of his driving privileges. In doing so, the trial court concluded that Licensee failed to prove an inability to make a knowing and conscious refusal of testing as a result of a concussion. (Trial Ct. Decision at 7.) The trial court reasoned that Dr. Sydney's testimony was equivocal and not legally sufficient under the case law. The trial court also noted that it gave little weight to Dr. Sydney's testimony, because Dr. Sydney's opinions were based upon Licensee's versions of events, and the trial court found Licensee's testimony lacking in credibility. Licensee filed a motion for reconsideration, which the trial court denied. Licensee now appeals to this Court.[2]

On appeal,[3] Licensee contends that the trial court erred in concluding that he refused chemical testing within the meaning of Section 1547 of the Code,

---

[2] Following Licensee's appeal to this Court, the trial court issued an opinion pursuant to Pa. R.A.P. 1925(a) in support of its original order.

[3] This Court's review of an order of a trial court denying a licensee's statutory appeal from a license suspension by DOT is limited to considering whether the trial court's factual

(Footnote continued on next page…)

because his expert provided unequivocal testimony that Licensee was incapable of making a knowing and conscious refusal as a result of having suffered a concussion. Essentially, Licensee argues that the trial court erred in applying our decisions in *Kollar v. Department of Transportation, Bureau of Driver Licensing*, 7 A.3d 336 (Pa. Cmwlth. 2010), and *DiGiovanni v. Department of Transportation, Bureau of Driver Licensing*, 717 A.2d 1125 (Pa. Cmwlth. 1998), to conclude that Dr. Sydney's testimony was incompetent.

In order to suspend a licensee's driving privileges for refusing to submit to chemical testing, DOT must establish the existence of the following elements: (1) the police arrested the licensee based upon reasonable grounds to believe that the licensee was operating a motor vehicle while under the influence of alcohol; (2) the police asked the licensee to submit to a chemical test; (3) the licensee refused to submit to testing; and (4) the police warned the licensee that refusing to submit to testing would result in license suspension. *Bomba v. Dep't of Transp., Bureau of Driver Licensing*, 28 A.3d 946, 949 (Pa. Cmwlth. 2011).

Once DOT establishes that a licensee refused to submit to testing, the burden shifts to the licensee to establish that he was not physically capable of submitting to testing. *Dep't of Transp., Bureau of Driver Licensing v. Ingram*, 648 A.2d 285, 293 (Pa. 1994). When, as in this case, a licensee alleges that he could not make a knowing and conscious refusal because of a medical disability,

---

(continued…)

findings are supported by competent evidence, and whether the trial court erred as a matter of law or demonstrated a manifest abuse of discretion. *McCloskey v. Dep't of Transp., Bureau of Driver Licensing*, 722 A.2d 1159, 1161 (Pa. Cmwlth.), *appeal denied*, 740 A.2d 235 (Pa. 1999).

the licensee must submit competent, unequivocal medical testimony to prove the licensee's inability to submit to testing. *Id*. Whether a licensee was capable of making a knowing and conscious refusal is a factual determination to be made by the trial court. *Kollar*, 7 A.3d at 340. In *Kollar*, we explained:

> A driver's self-serving testimony that she was incapable of providing a knowing and conscious refusal of chemical testing is insufficient to meet the licensee's burden of proof. Medical testimony is generally required in order to establish a licensee was unable to provide a knowing and conscious refusal to submit to chemical testing. The medical expert must rule out alcohol as a contributing factor to the licensee's inability to offer a knowing and conscious refusal in order to satisfy the licensee's burden. Indeed, if the motorist's inability to make a knowing and conscious refusal of testing is caused in whole or in part by consumption of alcohol, the licensee is precluded from meeting her burden as a matter of law.
>
> To be deemed competent, a medical opinion must be offered that is within a reasonable degree of medical certainty. Medical testimony, however, will be deemed incompetent if it is equivocal. A medical opinion is equivocal if it is merely based on possibilities. The opinion of a medical expert must be viewed as a whole.

Kollar, 7 A.3d at 340 (internal citations omitted).

This Court in *Kollar* observed that Kollar's medical expert,

> was not as adamant that the licensee's injuries would have rendered licensee incapable of offering knowing and conscious refusal regardless of any alcohol consumption. He did not rule out alcohol as the cause of any inability [the l]icensee may have had to understand and process the request made by [the o]fficer . . . to submit to chemical testing. Rather, [the medical expert] engaged in a balancing test as to whether [the l]icensee's alcohol consumption or her injuries sustained in the motor vehicle accident were the more significant factor

> leading to her inability to make a knowing and conscious refusal.

Id.

In *DiGiovanni*, we considered similar circumstances and concluded that the physician's testimony about a driver's concussion did not rule out alcohol as a factor in the driver's refusal to submit to testing, and, therefore, the driver did not meet his burden to prove that he was incapable of making a knowing and conscious refusal through unequivocal medical testimony.

Here, Licensee seeks to distinguish the testimony of Dr. Sydney from the medical experts in *Kollar* and *DiGiovanni* in an attempt to establish that Dr. Sydney's testimony was not equivocal, and, therefore, the trial court erred in concluding that Licensee failed to meet his burden to prove that Licensee was incapable of providing a knowing and conscious refusal of chemical testing. Even if the Court were to agree with Licensee, however, that Dr. Sydney's testimony was not equivocal, Licensee still would not prevail. Although the trial court found the testimony to be equivocal, it nevertheless considered Dr. Sydney's testimony and assigned it "little weight," because his opinion was based on Licensee's versions of events, which the trial court specifically rejected as not credible. The trial court explained:

> [A]s fact finder, the undersigned was not required to accept Dr. Sydney's testimony. We fully explained why Dr. Sydney's equivocal testimony that he "doubted that alcohol played a role" was assigned little weight. *Dr. Sydney's opinion was predicated upon crediting Bonner's testimony in that he had no memory of these events and that he had only two beers. Because I did not credit Bonner's testimony in this regard, Dr. Sydney's testimony was assigned little weight.*

(Trial Ct. Opin. at 3 (emphasis added).) Thus, putting aside the issue of whether Dr. Sydney's testimony was equivocal, the trial court found his testimony to be unconvincing, and, therefore, the trial court concluded that Licensee failed to meet his burden to prove (through medical testimony) that he was incapable of providing a knowing and conscious refusal of chemical testing. It is well-settled that the trial court is entitled to make credibility determinations, and "may accept or reject the testimony of any witness in whole or in part." *Finney v. Dep't of Transp., Bureau of Driver Licensing*, 721 A.2d 420, 423 (Pa. Cmwlth. 1998). Such determinations will not be disturbed on appeal. *Id.*

Accordingly, we affirm the trial court's order.[4]

P. KEVIN BROBSON, Judge

[4] Because the trial court considered Dr. Sydney's testimony, despite having found it to be equivocal, and still concluded that Licensee did not meet his burden to prove that he was incapable of making a knowing and conscious refusal because it found Dr. Sydney's testimony to be unconvincing, we need not address further Licensee's argument that the trial court erred in concluding that the testimony also was equivocal.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Francis Bonner, Appellant	:	
v.	:	No. 2022 C.D. 2013
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing	:	

O R D E R

AND NOW, this 1st day of October, 2014, the order of the Court of Common Pleas of Montgomery County is AFFIRMED.

P. KEVIN BROBSON, Judge