

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Paula Ann Grimsley	:	
	:	
v.	:	
	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	No. 920 C.D. 2020
Appellant	:	Submitted: July 2, 2021

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE ANNE E. COVEY, Judge  
HONORABLE CHRISTINE FIZZANO CANNON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE COVEY

FILED: October 12, 2021

The Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (DOT) appeals from the Allegheny County Common Pleas Court’s (trial court) August 13, 2020 order sustaining Paula Ann Grimsley’s (Licensee) appeal from DOT’s 12-month suspension of her driving privileges. DOT presents three issues for this Court’s review: (1) whether the trial court erred as a matter of law by sustaining Licensee’s appeal on the basis that she did not make an affirmative act or statement refusing O’Hara Township Police Officer Craig Cress’s (Officer Cress) request for a breath test; (2) whether there was competent evidence that the DataMaster DMT breathalyzer needed to be removed from service following the *ambient fail* message; and (3) whether there is any merit to the trial court’s statement that, because Fox Chapel Borough Police Officer Don Stoner (Officer

Stoner) signed the DL-26 Form<sup>1</sup> (Form) refusal certification, he was required to testify at the hearing. After review, this Court reverses.

On November 20, 2019, Officer Stoner arrested Licensee for driving under the influence of alcohol (DUI) and brought her to the police station for a breath test.<sup>2</sup> Licensee agreed to take the breath test and Officer Cress provided Licensee with instructions on how to properly complete the test. Licensee first gave a short breath of air. Officer Cress stopped her and instructed her again on the proper way to give a valid breath sample. Licensee did not provide a valid breath sample during the first test because she took small short breaths. The DataMaster DMT printed out an “incomplete” test result, and Officer Cress reset it. Reproduced Record (R.R.) at 21a, 60a. Officer Cress prepared to give Licensee a second opportunity to take a breath test. After Officer Cress input the necessary data, the DataMaster DMT ran a diagnostic test and provided an “ambient fail” message.<sup>3</sup> R.R. at 59a. Officer Cress then gave Licensee the second test. Licensee provided a short breath, then stopped. After three similar attempts, Officer Cress deemed Licensee’s second test a refusal. The DataMaster DMT’s print-out showed that Licensee had produced very short supplies of air.

On January 2, 2020, DOT mailed Licensee an Official Notice of Suspension of Driving Privilege (Notice) for one year, effective February 6, 2020. Licensee appealed from the Notice to the trial court. On August 13, 2020, the trial

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<sup>1</sup> “The DL-26 Form contains the chemical test warnings required by Section 1547 of the Vehicle Code, [75 Pa.C.S. § 1547,] which are also known as the implied consent warnings.” *Vora v. Dep’t of Transp., Bureau of Driver Licensing*, 79 A.3d 743, 745 n.2 (Pa. Cmwlth. 2013).

<sup>2</sup> Licensee stipulated that she was arrested for “DUI by a police officer who had reasonable grounds to believe she was driving under the influence; that she was asked to submit to a chemical test, [and that she] was specifically warned [that] the refusal[] would result in suspension of her driving privileges.” Reproduced Record at 14a.

<sup>3</sup> Officer Cress testified that the breathalyzer “was purging the system. It br[ought] air into the system. It detected alcohol in the air.” R.R. at 21a.

court held a hearing, sustained Licensee’s appeal, and rescinded her driver’s license suspension. DOT appealed to this Court.<sup>4,5</sup> On September 22, 2020, the trial court ordered DOT to file a Concise Statement of Errors Complained of on Appeal pursuant to Pennsylvania Rule of Appellate Procedure (Rule) 1925(b) (Rule 1925(b) Statement). DOT timely filed its Rule 1925(b) Statement. On January 21, 2021, the trial court filed its opinion pursuant to Rule 1925(a).

DOT first argues that the trial court erred as a matter of law by sustaining Licensee’s appeal on the basis that she did not make an affirmative act or statement refusing Officer Cress’s request for a breath test.

Initially, “[w]hether the conduct at issue constitutes a refusal is a question of law reviewable by this Court.” *Conrad v. Dep’t of Transp., Bureau of Driver Licensing*, 226 A.3d 1045, 1051 n.4 (Pa. Cmwlth. 2020) (quoting *Lemon v. Dep’t of Transp., Bureau of Driver Licensing*, 763 A.2d 534, 538 (Pa. Cmwlth. 2000)).

Our Court has held that a licensee’s failure to provide two consecutive, sufficient breath samples, absent a proven medical reason that precludes h[er] from doing so, constitutes a refusal as a matter of law.<sup>[6]</sup> *Quick v. Dep’t of Transp., Bureau of Driver Licensing*, 915 A.2d 1268, 1271 (Pa. Cmwlth. 2007); *see* [Section 77.24(b)(1) of DOT’s Regulations,] 67 Pa. Code § 77.24(b)(1) (stating that “[t]he procedures for alcohol breath testing shall include, *at a minimum* . . . [t]wo consecutive actual breath tests, without a required

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<sup>4</sup> “Our review is to determine whether the factual findings of the trial court are supported by [substantial] evidence and whether the trial court committed an error of law or abused its discretion.” *Renfro v. Dep’t of Transp., Bureau of Driver Licensing*, 179 A.3d 644, 648 n.3 (Pa. Cmwlth. 2018).

<sup>5</sup> By June 30, 2021 Order, this Court precluded Licensee from filing a brief for her failure to comply with this Court’s April 20, 2021 Order, directing Licensee to file a brief within 14 days of the exit date of said Order.

<sup>6</sup> Licensee did not allege before the trial court that a medical reason precluded her from completing the tests.

waiting period between the two tests’) (emphasis added). Moreover, the ‘failure to complete a breathalyzer test, *whether or not a good faith effort was made to do so, constitutes a refusal per se to take the test.*’ *Sweeney v. Dep’t of Transp., Bureau of Driver Licensing*, 804 A.2d 685, 687 (Pa. Cmwlth. 2002) (*en banc*) (emphasis in original); *see Dep’t of Transp., Bureau of Driver Licensing v. Kilrain*, . . . 593 A.2d 932, 935 ([Pa. Cmwlth.] 1991) (*en banc*) (‘Anything less than a completed breathalyzer test which registers a blood alcohol reading on the breathalyzer constitutes a refusal.’).

*Conrad*, 226 A.3d at 1052.

*Hinderliter v. Dep’t of Transp., Bureau of Driver Licensing*, 235 A.3d 465, 468-69 (Pa. Cmwlth. 2020) (footnote omitted).

Here, Licensee was given two breath tests. Concerning the first breath test, Officer Cress testified:

Q. Okay. Would you explain -- okay. Let me get to this. What happened when it was time for [Licensee] to provide the breath sample to the Data[M]aster DMT instrument?

A. She did not provide a sample.

Q. Do you recall what did she do [sic] when you directed her to give a valid breath --

A. A very short breath of air. I stopped her and instructed her again how to do it, and she attempted it several times.

Q. Okay. Now, how much time does the instrument give the testing subject to provide a valid breath sample?

A. Two minutes.

Q. And was [Licensee] ordered [sic] a full two minutes to provide a valid breath sample?

A. She was.

Q. And your testimony was that she did or did not provide a valid breath sample during the first two[-]minute period?

A. She did not.

Q. Okay. And you are saying that -- are you saying she did during this two[-]minute period, she --

A. She provided a brief breath sample and then stopped. Repeat that. She would take a small, short breath sample and then stop.

Q. Okay. And that goes on for the full two-minute period?

A. That's correct.

Q. And what happened after that first full two-minute period that [sic] had expired?

A. The instrument said it was an incomplete test.

Q. Okay. Did the instrument at that point shut itself down or what happened?

A. After the incomplete test, it prints the paperwork out. And I had the opportunity to retest, so I retested.

R.R. at 19a-21a.

Relative to the second breath test, Officer Cress recalled:

Q. And what happened when [Licensee] was directed to provide a first breath sample on the [next] test that you conducted or attempted to conduct?

A. She provided a short breath, then stopped. This happened multiple times on that one. And after three attempts on that test, I deemed it a refusal.

Q. Okay. So how much time would you say had expired before you deemed her to have refused because of what happened during the third attempted test?

A. A minute and 50 seconds.

Q. And how many times did she start or stop blowing into the instrument during that minute and whatever period?

A. Three times in that particular one.

Q. And was it at that point following those -- in that one minute -- and you said 30 seconds?

A. It was almost two minutes.

Q. Almost two[-]minute period. What happened -- what did the instrument do after that? Did you tell the instrument that --

A. No. The instrument prompts a question if it's a refusal, at which time I deemed it a refusal.

Q. And you typed "Y" for yes, it was a refusal?

A. I typed it was a refusal.

Q. And could you explain why you told the instrument at that point that it was a refusal?

A. After the multiple times attempting to get a breath sample, she did not provide enough air any of the times, so I didn't believe she would provide an adequate sample.

R.R. at 22a-23a.

Because "the 'failure to complete a breathalyzer test, *whether or not a good faith effort was made to do so, constitutes a refusal per se to take the test*[,] Licensee's failure to successfully complete the breath test constituted a *per se* refusal." *Hinderliter*, 235 A.3d at 470 (quoting *Conrad*, 226 A.3d at 1052). Accordingly, the trial court erred by concluding that Licensee's failure to complete the test was not a refusal.

DOT next contends that the trial court erred by determining that the DataMaster DMT should not have been used for Licensee's second test after it produced a reading of *ambient failure* after her first test.

At the outset, "[DOT] [i]s not required to prove that the machine was in proper working order to establish a refusal. . . . [W]hen [DOT] can establish a refusal without relying on results from the breathalyzer machine, the operability or suitability of the machine is simply not at issue." *Hinderliter*, 235 A.3d at 470

(quoting *Spera v. Dep't of Transp., Bureau of Driver Licensing*, 817 A.2d 1236, 1240 (Pa. Cmwlth. 2003)).

Notwithstanding, Section 77.24(b) of DOT's Regulations provides, in relevant part:

Alcohol breath tests, accuracy inspection tests and calibrations conducted using breath test equipment shall be performed in accordance with accepted standard procedures for operation specified by the manufacturer of the equipment or comparable procedures. The procedures for alcohol breath testing shall include, at a minimum:

(1) Two consecutive actual breath tests, without a required waiting period between the two tests.

(2) One simulator test using a simulator solution designed to give a reading of .10%, to be conducted immediately after the second actual alcohol breath test has been completed. The lower of the two actual breath test results will be the result used for prosecution. **The test results will be disregarded, and the breath test device will be removed from service under [Section] 77.25(b)(4) [of DOT's Regulations<sup>7</sup>] (relating to accuracy inspection tests for Type A equipment) if one of the following occurs:**

(i) If the difference between the results of the two actual alcohol breath tests is .02 or more, for machines read to the second decimal place, or .020

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<sup>7</sup> Section 77.25(b)(4) of DOT's Regulations mandates:

Breath test equipment which has malfunctioned or which fails an accuracy inspection test shall be placed out of service and shall be serviced or repaired, as necessary, by the manufacturer or its authorized representative or a person who has received comparable training or instruction and shall be tested under [Section] 77.26(b) [of DOT's Regulations] (relating to periodic calibration of Type A breath test equipment) prior to being placed back into service.

67 Pa. Code § 77.25(b)(4).

or more for machines read to the third decimal place.

(ii) If the simulator test yields a result less than .09% or greater than .10% when the breath test device is read to the second decimal place, or if the simulator test yields a result less than .090% or greater than .109% when the breath test device can be read to the third decimal place.

67 Pa. Code § 77.24(b) (emphasis added).

Here, neither of the above-quoted circumstances that mandate removing a breath test device from service occurred. Officer Cress explained:

A. When I put all the information back into the instrument[,] and it was running a diagnostic test . . . , [] it provided an *ambient failed*.

Q. Would you just explain to the judge what it means when the instrument comes up *ambient failed*?

A. It was purging the system. It bring [sic] air into the system. It detected alcohol in the air.

Q. In the air coming from a breath sample?

A. Just air -- alcohol in the air.

Q. Okay. And what happens -- what happened when the instrument registered *ambient failed*?

A. It provides another opportunity to do the test again.

R.R. at 21a-22a (italics added).

When questioned on cross-examination, Officer Cress expounded:

Q. Okay. So the only other question I have is the test -- in between Exhibit 3, there's a document on it for the same machine that I have stipulated was certified and calibrated prior to the date in question, at least within a timely manner. But the machine says *ambient failed*; right?

A. Correct.



Q. All right. Now, I've been doing this for 25 years, not as a police officer, obviously. But when it says *ambient failed*, you suspect it's because there was alcohol in the air of the room?

A. From my training, yes.

Q. Right. Now, either way, wouldn't you agree that that's really an anomaly, that does not happen often?

A. It does not happen often.

Q. Right.

A. I have had it happen before.

Q. Right. The machine basically said, *ambient failed* without her taking a breath test. It did it on its own, *ambient failed*.

....

Q. Would you agree it's an anomaly, it doesn't happen much?

A. In my experience, it has not happened much.

Q. Right. And how many years have you been doing this as a certified breath test operator?

A. Just under three years.

Q. All right. **The machine should have been taken out of service?**

A. **It would have taken itself out of service if there was a problem.**

Q. **Well, if the machine didn't take itself out of service because there was a problem, maybe it couldn't take itself out of service? Wouldn't you agree that's possible?**

A. **I do not agree to that.**

Q. You don't?

**A. If there was a problem with the instrument, it would have taken itself out of service.**

Q. That's correct. But if there were other problems, it's your duty to take it out of service and then take the client for another type of test so that there's no mistakes whatsoever; right?

A. We brought her -- we had her do it again. **It ran a diagnostic test, and it passed.** [See R.R. at 61a.]

R.R. at 33a-35a (italics and bold emphasis added).

Section 77.24(b)(2) of DOT's Regulations does not mandate that "the breath device [] be removed from service[,]” nor was any evidence presented that the *ambient fail* message required that the DataMaster DMT be removed from service. 67 Pa. Code § 77.24(b)(2). Accordingly, the trial court erred by making such determination.

DOT next asserts that there is no merit to the trial court's statement that, because Officer Stoner signed the Form certifying Licensee's refusal, he was required to testify at the hearing.

Here, the Form provided: "I certify that I have READ the above warnings to the operator regarding the suspension of his/her operating privilege and gave the operator an opportunity to submit to a breath test." R.R. at 58a. Thereunder, there is a space for "Signature of Officer[.]" *Id.* Officer Cress's signature appears on the line provided. Licensee signed the Form beneath the words: "I have been advised of the above." *Id.* Officer Stoner signed the Form's Affidavit, which stated: "I certify that all the information given in this [F]orm is true and correct to the best of my knowledge, information and belief." *Id.*

Officer Stoner signed the Affidavit because he was the arresting officer. Given that Licensee stipulated that Officer Stoner had reasonable grounds to believe she was driving under the influence, and that "[t]he only issue [before the trial court was] the actual chemical test refusal itself and whether or not she refused the test[,]”

there was no need for Officer Stoner's testimony. Since Officer Cress administered Licensee's breath test, only his testimony was necessary to satisfy DOT's burden. Accordingly, there is no merit to the trial court's statement that, because Officer Stoner signed the Form's refusal certification, he was required to testify at the hearing.

For all of the above reasons, the trial court's order is reversed.

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ANNE E. COVEY, Judge

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	:	
v.	:	
	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	No. 920 C.D. 2020
Appellant	:	

ORDER

AND NOW, this 12<sup>th</sup> day of October, 2021, the Allegheny County Common Pleas Court's August 13, 2020 order is reversed.

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ANNE E. COVEY, Judge