

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Darlene Ann Yourick :
 :
 v. : No. 2280 C.D. 2007
 : Submitted: April 25, 2008
 Commonwealth of Pennsylvania, :
 Department of Transportation, :
 Bureau of Driver Licensing, :
 Appellant :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION

BY JUDGE LEAVITT

FILED: July 23, 2008

The Pennsylvania Department of Transportation, Bureau of Driver Licensing (Department) appeals from an order of the Court of Common Pleas of Allegheny County (trial court) setting aside its suspension of the operating privileges of Darlene Ann Yourick (Licensee). The Department suspended Licensee pursuant to Section 1547 of the Vehicle Code¹ (Code) after she refused to submit to chemical testing upon her arrest for driving under the influence of alcohol. In this appeal, we consider whether Licensee was specifically warned, as required by law, that a refusal

¹ 75 Pa. C.S. §1547. Section 1547(b)(1) of the Code, commonly referred to as the “Implied Consent Law,” authorizes suspension of the driving privileges of a licensee where the licensee is placed under arrest for driving under the influence of alcohol, and the licensee refuses a police officer’s request to submit to chemical testing.

of chemical testing would result in the suspension of her driver's license.² Concluding that her warning was not clear, we affirm the trial court.

On March 30, 2007, the Department notified Licensee that her driving privileges were being suspended for one year, effective May 4, 2007, as a result of her refusal to submit to chemical testing on February 28, 2007. Reproduced Record at 6a-8a (R.R. ____). Licensee appealed, and the trial court held a *de novo* hearing on September 27, 2007. At the beginning of the hearing, Licensee stipulated that she was arrested for driving under the influence of alcohol; that there were reasonable grounds for requesting that Licensee submit to a chemical test; that Licensee was asked to submit to a Breathalyzer test; and that she refused to take the test.

Officer Sheldon Summers, testifying on behalf of the Department, confirmed that he arrested Licensee and transported her to the police station. There, he read verbatim all four paragraphs of the DL-26 Form chemical testing warnings to her. Officer Summers testified that he read the warnings to Licensee three times, and she refused chemical testing three times. The actual form used by Officer Summers,

² Section 1547(b)(2) of the Code specifies the information which must be given to an arrestee as follows:

- (2) It shall be the duty of the police officer to inform the person that:
 - (i) the person's operating privilege will be suspended upon refusal to submit to chemical testing; and
 - (ii) if the person refuses to submit to chemical testing, upon conviction or plea for violating section 3802(a)(1), the person will be subject to the penalties provided in section 3804(c) (relating to penalties).

75 Pa. C.S. §1547(b)(2).

which is the August 2006 version of the DL-26 Form, was submitted into evidence.³

Paragraph three of that DL-26 Form states, in relevant part, as follows:

It is my duty as a police officer to inform you that if you refuse to submit to the chemical test, your operating privilege 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.

R.R. 33a.

³ Specifically, the August 2006 DL-26 Form warnings consist of four paragraphs which state as follows:

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

R.R. 33a (emphasis in original).

Officer Summers testified that Licensee told him she was afraid to submit to chemical testing because she had consumed one glass of wine. Officer Summers had no recollection of Licensee asking him any questions about the meaning of paragraph three of the warnings, and he stated that he and Licensee had no discussion about the ramifications of refusing chemical testing, other than what he recited directly from the DL-26 Form.

Licensee testified on her own behalf. At the time of the hearing, she was 47 years old and had worked for UPMC Medical Center for 25 years; the first 14 years were in the corporate legal department and the remaining years were in the medical malpractice department. Licensee explained that her job involves reading and evaluating forms, such as patient informed consent forms, on a daily basis.

Licensee admitted that Officer Summers read her the implied consent warnings from the DL-26 Form. Based on that warning, she believed that her license would not be suspended if she refused chemical testing because she never had a prior refusal and had never before been sentenced for driving under the influence. She pointed out:

The criteria, specifically the word if beginning on the very first line – if you refuse to submit to the chemical test your operating privileges will be suspended for at least twelve months, and up to eighteen months, if you have had a prior refusal – which I have not – or if you have been previously sentenced for driving under the influence, which I have not.

R.R. 21a. Licensee stated that she voiced her concern about the meaning of that sentence to Officer Summers, but he informed her that she had no right to speak with anyone. Licensee then read the form herself and decided to refuse testing. Licensee explained:

... I did not meet the criteria that I would be -- my license would automatically be suspended. If the word if was not there, if it simply said -- the form simply stated by refusing you will lose your license I would have submitted to the breath test. It does not say that, it says if.

R.R. 23a.

On November 16, 2007, the trial court issued an order sustaining Licensee's appeal. The Department appealed, and the trial court issued an opinion on January 30, 2008, in accordance with PA. R.A.P. 1925(a). The trial court found that both Officer Summers and Licensee testified honestly. The trial court found that Licensee, who has expertise in reading and construing forms, believed, based on the language found in paragraph three of the warnings, that she was not a candidate for suspension because she had never before been stopped by police or refused chemical testing. The trial court found that paragraph three of the warnings is poorly drafted and vague, "since a comma was placed randomly where perhaps a period might have been." Trial court opinion at 3. The trial court concluded that this vague language confused Licensee and prevented her from making a knowing and conscious refusal; therefore, a suspension was not warranted. The matter is now before this Court.⁴

On appeal, the Department raises two issues for our consideration. First, the Department contends that the trial court erred in concluding that Licensee met her burden of proving that she could not make a knowing and conscious refusal to submit to chemical testing. Second, the Department argues that Licensee did not prove that

⁴ This Court's scope of review is limited to determining whether the trial court's findings are supported by competent evidence, whether errors of law have been committed or whether the trial court's determinations demonstrate a manifest abuse of discretion. *Finnegan v. Department of Transportation, Bureau of Driver Licensing*, 844 A.2d 645, 648 n.3 (Pa. Cmwlth. 2004).

her inability to understand the implied consent warnings was not the result of alcohol consumption.

We consider, first, the Department's challenge to the trial court's holding that paragraph three of the August 2006 version of Form DL-26 was so ambiguous that Licensee was not able to make a knowing and conscious refusal. The Department asserts that the warnings given to Licensee from the DL-26 Form were sufficient, based on this Court's holding in *Weaver v. Department of Transportation, Bureau of Driver Licensing*, 873 A.2d 1 (Pa. Cmwlth. 2005) (*Weaver I*), which was affirmed by the Pennsylvania Supreme Court in *Department of Transportation, Bureau of Driver Licensing v. Weaver*, 590 Pa. 188, 912 A.2d 259 (2006) (*Weaver II*), and that Licensee was given enough information to understand that her license would be suspended if she refused chemical testing.

Licensee counters that paragraph three of the DL-26 Form is vague and ambiguous to the point that it does not adequately warn of the consequences of refusing to submit to chemical testing. Because the Department did not meet its burden of proof regarding the sufficiency of its warning, it was not her burden to prove that she was not physically or mentally capable of making a knowing and conscious refusal.

To sustain a license suspension under Section 1547 of the Code, the Department bears the burden of proving that the driver (1) was placed under arrest for driving while under the influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was specifically warned that a refusal would result in the revocation of his or her driver's license. *Todd v. Department of Transportation, Bureau of Driver Licensing*, 555 Pa. 193, 197, 723 A.2d 655, 657-658 (1999). The last prong of the Department's burden requires "a precisely

enunciated warning that a driver's license *will be* revoked.” *Everhart v. Commonwealth of Pennsylvania*, 420 A.2d 13, 15 (Pa. Cmwlth. 1980) (emphasis added).⁵ If the Department meets its initial burden, the burden then shifts to the licensee to show that her refusal was not knowing or conscious or that she was physically unable to take the test. *Yoon v. Department of Transportation, Bureau of Driver Licensing*, 718 A.2d 386, 388 (Pa. Cmwlth. 1998). Where a licensee is not adequately informed of the consequences of a refusal, it is irrelevant whether the refusal to submit to chemical testing was knowing and conscious. *Id.* at 388, n.5.

In its appeal, the Department presumes that because Officer Summers read Licensee the implied consent warnings verbatim from the DL-26 Form, she received a proper warning and that the burden then shifted to Licensee to prove that she was not physically or mentally able to make a knowing and conscious refusal. Specifically, the Department contends that because Licensee stipulated to the first three prongs of the Department's burden of proof, and Officer Summers read directly from the DL-26 Form, “there is no question but that the [Department] did satisfy its *prima facie* burden of proof.” Department's brief at 14.

Although the Department frames the issue as whether Licensee gave a knowing and conscious refusal, as did the trial court, the real issue is whether the warning given to Licensee was legally sufficient. The law required the Department to prove that Licensee was specifically warned that a refusal to submit to chemical testing would result in the suspension of her driving privilege. We conclude that the Department was not able to meet its burden in this regard.

⁵ In *Everhart*, a warning that the driver's license *could be* revoked if he refused chemical testing was deemed insufficient.

We begin with a brief discussion of *Weaver I* and *Weaver II*, on which the Department relies. The issue in *Weaver I* and *II* was the legal sufficiency of certain warnings found in the December 2003 version of the DL-26 Form. In explaining the possible penalties for refusal in the case of someone who is later convicted, pleads guilty to or is adjudicated delinquent with respect to driving under the influence, that DL-26 Form explained only that “you will be subject to the more severe penalties set forth in Section 3804(c) of the Vehicle Code, which include a minimum of 72 hours in jail and a minimum fine of \$1000.00.” *Weaver II*, 590 Pa. at 190 n.1, 912 A.2d at 260 n.1.

In *Weaver I*, the licensee argued that the officer needed to enumerate the penalties set forth in Section 3804(c), but this Court held that the above-quoted language was adequate because “[i]t is sufficient for the police to inform a motorist that he or she will be in violation of the law and will be penalized for that violation if he or she should fail to accede to the officer’s request for a chemical test.” *Weaver I*, 873 A.2d at 2. In *Weaver II*, our Supreme Court agreed with this Court that the above-quoted warnings were legally sufficient. The Supreme Court explained that the Vehicle Code “requires only that the officer inform the arrestee that if he is convicted of DUI, refusal will result in additional penalties; it does not require the officer to enumerate all of the possible penalties, as appellant claims.” *Weaver II*, 590 Pa. at 196, 912 A.2d at 264.

The *Weaver* cases do not dictate the outcome in this case. They dealt with the warning requirement found in Section 1547(b)(2)(ii) of the Code regarding additional penalties, as opposed to Section 1547(b)(2)(i) dealing with suspension, which is the issue in this case. What is more, the *Weaver* cases dealt with the

sufficiency of the language in an earlier version of the DL-26 Form, which is different from the one read to Licensee.

To determine the sufficiency of the warning given to Licensee, we must examine the August 2006 version of the DL-26 Form. As explained in *Weaver I*, a warning is sufficient if it informs the licensee that refusing a request for chemical testing means that she “will be in violation of the law and will be penalized for that violation.” *Weaver I*, 873 A.2d at 2. The Department asserts that paragraph three in the current warning meets this standard because it informed Licensee that her operating privilege would be suspended for at least 12 months if she refused Officer Summers’ request for a breath test. According to the Department, it is of no moment that the warning arguably was not clear on whether the suspension would be for 12 or 18 months, because it is not necessary to warn a licensee as to the possible duration of a suspension.

To be legally sufficient, the warning must specifically inform the licensee that his or her “operating privilege *will be* suspended” upon refusal to submit to chemical testing. Section 1547(b)(2)(i) of the Code (emphasis added); *Todd*, 555 Pa. 193, 723 A.2d 655. The August 2006 DL-26 Form warning given to Licensee explains

if you refuse to submit to the chemical test, your operating privilege 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.

The Department reads the above-recited first “if clause” to apply to the entire provision. Accordingly, any refusal will result in a 12-month suspension and, further, that suspension could be increased to 18 months if the licensee has a history of prior refusals or convictions. However, the warning can be read another way. The

qualifying language at the end of the sentence, *i.e.*, “if you have prior refusals or have been previously sentenced...,” can be read to apply to the entire warning. Read that way, the suspension penalty applies only if the licensee has previously refused a test or previously been sentenced. The resulting suspension can range between 12 and 18 months.⁶ A passage that can be read two ways is ambiguous, and it is axiomatic that any ambiguity is to be construed against the drafter of the document if the other party’s interpretation is reasonable. *Jay Township Authority v. Robert J. Cummins*, 773 A.2d 828, 832 n.3 (Pa. Cmwlth. 2001) (citation omitted).

Licensee interpreted the warning to mean that a refusal to be tested would result in a license suspension only if she had a prior refusal or sentence for driving under the influence. This is a reasonable interpretation.⁷ Construing the ambiguous language against the Department as the drafter of the warnings, as we must, we hold that the warning given to Licensee was not sufficient to specifically warn her that a refusal to submit to chemical testing would result in the suspension of

⁶ Indeed, the wording of the warning in the previous December 2003 version of the DL-26 Form was much clearer than the new language. Paragraph three from the prior Form read:

It is my duty as a police officer to inform you that if you refuse to submit to the chemical test, your operating privilege will be suspended for at least one year. In addition, if you refuse to submit to the chemical test, and you are convicted of, plead to, or adjudicated delinquent with respect to violating Section 3802(a) of the Vehicle Code, because of your refusal, you will be subject to the more severe penalties set forth in Section 3804(c) of the Vehicle Code, which include a minimum of 72 hours in jail and a minimum fine of \$1000.00.

Weaver II, 590 Pa. at 190 n.1, 912 A.2d at 260 n.1. The first sentence clearly conveys, with no qualifying language, that refusal to submit to chemical testing will result in a suspension.

⁷ The Department asserts that Licensee’s belief that she would not suffer any adverse consequences if she refused a breath test belies common sense. However, based on the wording used by the Department, it was reasonable for Licensee to believe that there would be no suspension because the qualifying language did not apply to her. It is the Department’s responsibility to clearly communicate to a licensee that a refusal results in a suspension, and it failed to do so.

her operating privilege.⁸ As such, the Department failed to meet its burden of proof and the trial court did not err in sustaining Licensee's appeal.⁹

Accordingly, we affirm the order of the trial court.

MARY HANNAH LEAVITT, Judge

President Judge Leadbetter dissents.

⁸ The Department repeatedly points out that Officer Summers read the warning three times. However, as the warning was insufficient, it does not matter how many times the officer repeated it.

⁹ We acknowledge the Department's second argument that Licensee failed to show that her alcohol or drug consumption played no part in her inability to understand the implied consent warnings. This goes to the issue of whether her refusal was not knowing and conscious. However, because the warning is ambiguous, it would be unclear to a sober individual as well as someone under the influence, and is an insufficient warning as a matter of law. Therefore, it is not relevant whether Licensee's refusal was knowing and conscious.

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ORDER

AND NOW, this 23rd day of July, 2008, the order of the Court of Common Pleas of Allegheny County in the above-captioned matter, dated November 16, 2007, is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge