THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

	:	**CIVIL TRIAL DIVISION**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION	:	
Appellant,	:	**APRIL TERM, 2007 No. 090**
v.	:	
EDWARD SOLOMON	:	**Commonwealth Court Docket No. 303 CD 2008**
Appellee.	:	

O P I N I O N

Appellant, Commonwealth of Pennsylvania Department of Transportation (hereinafter DOT) appealed from this Court's January 11, 2008 Order sustaining Edward Solomon's (Solomon) appeal of a one (1) year license suspension for refusal to submit to a chemical test pursuant to 75 Pa.C.S.§1547(b)(1).

By way of background, on January 29, 2007 Solomon was arrested for driving under the influence of alcohol. (N.T. dated 1/11/08, pg. 7). Officer Philip Muscarnero (arresting officer) encountered Solomon's vehicle at approximately 2:55 a.m. at the 1700 block of South Swanson Street parked in between the parking lot and a nightclub. (N.T. pg. 4-5). He was asleep, slumped back in the fully reclined driver's side seat of his vehicle with the vehicle running. (N.T. pg. 5). Although Solomon's car was running, it was parked in an area where cars routinely park. (N.T. pgs. 6, 11). Solomon candidly admitted to that he had three drinks while at the nightclub. (N.T. pg. 35). He testified that it was cold and snowing on this particular night and that he had purposely gone to his

car to sleep. (N.T. pg. 27). Because it was cold and snowing, Solomon had turned on the vehicle to heat the car. (N.T. pg. 27). Officer Muscarnero approached the parked vehicle and tapped on the window several times before waking Solomon. (N.T. pg. 6). Once Solomon awoke, he exited the vehicle. (N.T. pg. 7). Upon Solomon exiting the vehicle Officer Muscarnero detected a faint odor of alcohol, slurred speech and unsteadiness on his feet. (N.T. pg. 7). Officer Muscarnero states that it is for these reasons that Solomon was then placed under arrest for driving under the influence of alcohol. (Id.). Solomon was transported to the police administration building for the administration of a chemical test to be performed by Officer Thomas O'Neil. (N.T. pg. 17). It is alleged by the DOT that after Solomon was read his O'Connell warnings, he was asked if he would agree to chemical testing. (N.T. pg. 18). Solomon replied "go f*** yourself and do what you've got to do." (N.T. pg. 19). Having only asked Solomon once whether he would agree to chemical testing, Officer O'Neil treated Solomon's response as a refusal. (N.T. pg. 18, 22). Solomon states that he did not refuse to take the test and that he and another officer, who transported him to the police administration building were having a dispute as to why he was being arrested; his frustration with the officer caused him to make this response. (N.T. pg. 17, 31-32). Solomon was subsequently processed for the charge driving under the influence of alcohol and the officer notified DOT of Solomon's refusal to submit to chemical testing.

On March 6, 2007, Solomon received a Notification of Suspension from DOT stating that as a result of his refusal to submit to chemical testing, the DOT will suspend his operating privileges for a period of 1 year effective April 10, 2007. (Notice of Appeal). On April 2, 2007, Solomon filed his Notice of Appeal from the March 6, 2007

DOT Notice of Suspension. The appeal was heard before this Court on January 11, 2008. (See Docket).

After the hearing was conducted, this Court issued its Order sustaining Solomon's appeal and rescinding the suspension of his operating privileges. The Order was entered on January 11, 2008 and docketed on January 15, 2008. DOT filed its Notice of Appeal to the Commonwealth Court on February 14, 2008 and issued its Statement of Matters accordingly. DOT alleges two errors in its Statement of Matters:

1. Whether this Court committed an error of law or abused its discretion in finding that Solomon was not operating or in actual physical control of his motor vehicle when officers discovered his car parked, with Solomon reclined in his seat and asleep in his vehicle.

2. Whether this Court committed an error of law or abused its discretion in finding that Solomon did not refuse to submit to chemical testing pursuant to 75 Pa.C.S.A. §1547.

An Appellate Court's standard of review in a license suspension case is to determine whether the factual findings of the trial court are supported by competent evidence and whether the trial court committed an error of law or an abuse of discretion. *Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Boucher*, 547 Pa. 440, 443-444, 691 A.2d 450 (1997).

The Implied Consent Law set forth in Section 1547 provides as follows:

> (a) General rule.-- Any person who drives, operates or is in actual physical control of the movement of a motor vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a

> police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a motor vehicle:
>
> (1) …3802 (relating to driving under influence of alcohol or controlled substance….
>
> (b) Suspension for refusal. --
>
> (1) If any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person as follows:
>
> (i) Except as set for in subparagraph (ii), for a period of 12 months.
>
> (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 persons 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).
>
> (3) Any person whose operating privilege is suspended under the provisions of this section shall have the same right of appeal as provided for in cases of suspension for other reasons.

The first issue we must resolve is to determine whether the officer had reasonable grounds to believe Solomon was driving, operating or in actual physical control of the movement of a vehicle while under the influence of alcohol according to 1547(a)(1).

Reasonable grounds exist when a person in the position of the police officer, viewing the facts and circumstances as they appeared at the time, could have concluded that the motorist was operating the vehicle while under the influence of intoxicating

liquor. *Dipaolo v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 700 A.2d 569 (Pa. Cmwlth. 1997). In determining whether an officer had reasonable grounds to believe that a motorist was in "actual physical control" of a vehicle, the court must consider the *totality of the circumstances, including the location of the vehicle, whether the engine was running and whether there was other evidence indicating that the motorist had driven the vehicle at some point prior to the arrival of the police*. *Commonwealth v. Wolen*, 546 Pa. 448, 450, 685 A.2d 1384, 1385 (1996) (emphasis added). Whether reasonable grounds exist is a question of law reviewable by the court on a case by case basis. *Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing v. Malizio*, 152 Pa. Commw. 57, 618 A.2d 1091 (1992). According to our Supreme Court, appellate courts must give deference to the trial court's decision made based on the credibility of witnesses because the trial Court had the opportunity to observe the demeanor of the witnesses and heard them testify. *Commonwealth v. Bomar*, 573 Pa. 426; 826 A.2d 831, 843 (2003).

In *Banner v. DOT*, 558 Pa. 439, 443; 737 A.2d 1203, 1207 (1999), Our Supreme Court held that given the totality of the circumstances, the officer did not have reasonable grounds to prove that the driver was in actual physical control of his motor vehicle, where the driver was found around 4:00 a.m. asleep in the reclined seat of his car along side a road with the keys in the ignition.

The *Banner* Court stated "*A line must be drawn to distinguish circumstances where a motorist is driving his vehicle while under the influence of alcohol, which the statute is intended to prevent, and circumstances where a motorist is physically present in a motor vehicle after becoming intoxicated*." Id. at 1208. (emphasis added).

The cases cited in *Banner* where actual physical control was found reiterate our Supreme Court's principle as set forth in *Wolen,* that a licensee must be situated in the vehicle in such a way that would indicate that they either had recently operated the vehicle or that they had a current and manifest intention to operate their vehicles. (See *Banner citing Vinansky v. Department of Transportation, Bureau of Driver Licensing,* 665 A.2d 860 (Pa. Cmwlth. 1995), actual physical control was found where the licensee was discovered slumped over the steering wheel of a truck parked in a parking lot behind a fire department social hall. The vehicle's engine was running and its brake lights were on. In *Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing v. Paige,* 156 Pa. Commw. 600, 628 A.2d 917 (Pa. Cmwlth. 1993), the licensee was asleep, slumped over the steering wheel with the key in the ignition. The vehicle was parked on a city street with its parking lights on. In *Polinsky v. Commonwealth of Pennsylvania, Department of Transportation,* 131 Pa. Commw. 83, 569 A.2d 425 (Pa. Cmwlth. 1990), licensee was found asleep behind the wheel of her vehicle, parked adjacent to a fast food restaurant pick-up window. The headlights of the car were on and the standard transmission was in gear, although the engine was not running. Similarly, in *Commonwealth of Pennsylvania, Department of Transportation, Bureau of Traffic Safety v. Farner,* 90 Pa. Commw. 201, 494 A.2d 513 (Pa. Cmwlth. 1985), licensee was found behind the wheel of his truck, parked in a traffic lane with his hands on the steering wheel. The licensee had started the engine and activated the brake lights, but had left the transmission in "park" and did not cause the vehicle to move)). Id. at 1208-1209.

Although Solomon's car was running, it was parked in an area where cars routinely park. Solomon candidly admitted to that he had three drinks while at the nightclub. (N.T. pg. 35). He testified that it was cold and snowing on this particular night and that he had purposely gone to his car to sleep. (N.T. pg. 27).

When found by the police, Solomon was reclined in the seat of the vehicle sound asleep. The officers did not recall having seen any headlights on, nor was the vehicle in gear. Solomon testified that the reason the car engine was on was so he could heat the inside of the car while he was sleeping. Solomon did not have his hands on the wheel of the car, nor did he have his seat in a position to operate the vehicle.

Neither of the officers who testified witnessed Solomon operating the motor vehicle, but created the assumption that because his parked vehicle was located in a travel lane that he must have been operating his motor vehicle. This testimony amounts to pure speculation on the part of the officers because there is no evidence to support this theory. Conversely, this Court, found Solomon's testimony on these issues to be more credible and supported this Court's conclusion that he was not operating his vehicle and was not in actual physical control of the vehicle.

Based on the totality of the circumstances, there is no evidence produced by DOT that would indicate that Solomon had driven the vehicle after he left the club and prior to the arrival of the police.

In addressing the second issue of whether Solomon's comments amounted to a refusal to chemical testing, it is well settled that to sustain a license suspension under Section 1547 of the Vehicle Code, the Department has the burden of establishing that the driver (1) was arrested for drunken driving by a police officer who had reasonable

grounds to believe that the motorist was operating, or actually controlling or operating the movement of a motor vehicle, while under the influence of alcohol; (2) was requested to submit to a chemical test; (3) refused to do so; and (4) was warned that refusal would result in a license suspension. *Department of Transportation v. O'Connell*, 521 Pa. 242, [*73] 555 A.2d 873 (1989). "The law is clear that a refusal is defined as '*anything substantially less than unqualified, unequivocal assent to chemical testing*.'" *Brown v. Commonwealth*, 738 A.2d 71, 73 (Pa.Commw. 1999). (emphasis added). Thus it is the DOT's burden to prove that Solomon's comments amounted to "substantially less" than an unequivocal assent to chemical testing.

A refusal to take a breath test must be determined by looking at the totality of the circumstances taking into consideration the licensee's words and actions. *Marmo v. Commonwealth, Dep't of Transp.*, 543 A.2d 236, 238 (Pa.Commw. 1988).

Although Solomon's reply to a request for chemical testing was "go f*** yourself and do what you've got to do," he testified that the comment was made because of his frustration with the officers who arrested him and transported him for chemical testing without telling him the reason he was arrested. Despite Solomon's inappropriate language, the statement taken as a whole, does not constitute a phrase that is "substantially less than unqualified, unequivocal assent to chemical testing." This Court believed that the phrase "do what you've got to do" was Solomon's acquiesce to Officer O'Neil's request.

By way of further support, DOT did not present any evidence that Solomon was physically combative nor that he made any physical gestures, which would corroborate a refusal. Officer O'Neil chose not to ask Solomon any follow-up questions, which may

have provided further evidence of a refusal. Instead, Solomon was immediately deemed a refusal and he was escorted out of the testing room. Although Officer O'Neil may have been offended by Solomon's statement, the law requires us to focus on whether his statement acted as a refusal to have a chemical test performed.

Based on the totality of the circumstances before this Court, the responsive phrase "do what you've got to do" to Officer O'Neil's request for chemical testing, along with the absence of any further evidence from DOT in support of a refusal does not constitute a "substantially less than unqualified, unequivocal assent to chemical testing." Therefore Solomon's response was not a refusal of chemical testing pursuant to 75 Pa.C.S.A. §1547.

Based on the aforementioned analysis this Court believes that the Order dated January 11, 2008 sustaining Solomon's appeal and rescinding his one (1) year license suspension should be affirmed.

BY THE COURT:

6-26-2008

_____ _____

Date **ALLAN L. TERESHKO, J.**

cc:

Marc Werlinsky, Esq., for Appellant
Willis F. Watson, Esq., for Appellee