IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

KENNETH MITCHELL BECKER, Appellant	:	
vs.	:	NO. 15-1049
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION BUREAU OF DRIVER LICENSING, Appellee	:	

Christopher Opiel, Esquire — Counsel for Plaintiff
Tricia J. Watters, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – February 11, 2016

Appellant, Kenneth Mitchell Becker (hereinafter "Appellant"), has appealed to the Commonwealth Court from our order dated December 7, 2015, denying his license suspension appeal. In this appeal, Appellant questions whether an intoxicated driver's operating privileges can be suspended under Section 1547(b) of the Vehicle Code, 75 Pa.C.S.A. § 1547(b), for refusing to submit to chemical testing requested by an arresting police officer where the underlying driving offense occurred on a private development road not open to the general public.

PROCEDURAL AND FACTUAL BACKGROUND

On April 7, 2015, Trooper Carrie A. Gula of the Pennsylvania State Police was dispatched to the scene of a motor vehicle accident at the intersection of North Shore Drive and

Wintergreen Drive in the Indian Mountain Lakes Development (hereinafter the "Development"). Indian Mountain Lakes is a private residential community located partly in Carbon County and partly in Monroe County, Pennsylvania. It is a gated community, although it is unclear whether every entrance to Indian Mountain Lakes is actually secured by a gate, security guard, or both. (N.T., 6/24/15, pp.10-11). In any event, on this occasion, Trooper Gula was dispatched at the request of security from Indian Mountain Lakes who reported that an intoxicated driver had driven his vehicle into a ditch. (N.T., 6/24/15, p.4). Upon arrival at the Development, Trooper Gula was waved into the Development by a member of the Development's security detail.

At the intersection of North Shore Drive and Wintergreen Drive, within the Development, Trooper Gula observed Appellant inside a motor vehicle which had been driven into a ditch. Appellant was seated in the driver's seat and was unable to open the driver's door to exit the vehicle. Prior to Trooper Gula's arrival, security, who was on the scene at the time Trooper Gula arrived, had asked Appellant to turn the vehicle off and had taken his keys for security reasons.

Trooper Gula assisted Appellant in exiting the vehicle through the passenger side. Once outside the vehicle, Trooper Gula observed clear signs of intoxication: Appellant's speech

was slurred, his eyes were bloodshot, his gait was unsteady and a strong odor of alcohol emanated from his breath. Trooper Gula attempted to have Appellant perform field sobriety tests, however, this never occurred. Instead, Appellant walked away from the Trooper, stated he was stoned, and admitted to drinking Seven and Sevens. Consequently, Trooper Gula placed Appellant under arrest for suspected driving under the influence and transported Appellant to the Pennsylvania State Police Fern Ridge barracks for chemical testing of his breath. At the barracks, Trooper Gula read the warnings on the implied consent form, Form DL-26, to Appellant verbatim, which form advised Appellant that his operating privileges would be suspended upon refusal to submit to chemical testing and if convicted of violating Section 3802(a)(1) of the Vehicle Code, he would be subject to the penalties provided in Section 3804(c) of the Code. (Commonwealth Exhibit No.1). Appellant refused chemical testing and refused to sign the form.

When Trooper Gula was asked whether she knew where Appellant was coming from at the time of the accident, Trooper Gula testified that at one point Appellant told her he was coming out of his driveway and backed into a ditch, and at another time stated that he was at a bar. (N.T., 6/24/15, p.14). Trooper Gula also explained that the first response did not make sense since Appellant did not live across the street

from where the accident occurred, but rather lived approximately a block away. (N.T., 6/24/15, pp.16-17).

The evidence presented at the time of the license suspension hearing held on June 24, 2015, also developed that the Pennsylvania State Police respond to incidents within the Development when called by security or by a resident (N.T., 6/24/15, p.11), and that on this occasion, Trooper Gula had been dispatched to the scene of the accident at approximately 5:07 P.M. and arrived at the scene within approximately twenty minutes of dispatch. (N.T., 6/24/15, pp.4-5). Trooper Gula further testified that Appellant's vehicle was still warm when she arrived at the scene of the accident. (N.T., 6/24/15, p.17). Trooper Gula was the only witness to testify in this matter.

DISCUSSION

In Walkden v. Dep't of Transp., Bureau of Driver Licensing, 103 A.3d 432 (Pa.Cmwlth. 2014), the Court held that to support a one-year suspension of operating privileges imposed as a consequence of a driver's refusal to submit to chemical testing after being arrested for driving under the influence, the Bureau of Driver Licensing must prove that the licensee (1) was arrested for driving under the influence by a police officer who had reasonable grounds to believe that the licensee was operating the vehicle under the influence of alcohol or a

controlled substance; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was warned that a refusal would result in the suspension of his driver's license. *Id.* at 436. In this appeal, Appellant contests only the first element of this test, contending that because a driver cannot be convicted of driving under the influence while driving on a private road which is not open to the general public, his license cannot be suspended for refusing to submit to chemical testing for an offense of which he cannot be convicted.[1]

Chapter 38 of the Vehicle Code, 75 Pa.C.S.A. §§ 3801--3817, which deals with the topic of driving after imbibing alcohol or utilizing drugs, provides, in relevant part, that

> [a]n individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating, or being in actual physical control of the movement of the vehicle.

75 Pa.C.S.A. § 3802(a)(1) (Driving Under the Influence – Incapable of Safe Driving). Section 3101(b) of the Vehicle Code states, in relevant part, that the provisions of Chapter 38 "shall apply upon highways and trafficways throughout this Commonwealth." 75 Pa.C.S.A. § 3101(b). The Vehicle Code defines the term "highway" as

> [t]he entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for

> purposes of vehicular travel. The term includes a roadway open to the use of the public for vehicular travel on grounds of a college or university or public or private school or public or historical park,

and the term "trafficway" as

> [t]he entire width between property lines or other boundary lines of every way or place of which any part is open to the public for purposes of vehicular travel as a matter of right or custom.

75 Pa.C.S.A. § 102 (Definitions).

Under the foregoing, an essential element of the offense of driving under the influence is that the operation of the motor vehicle have occurred on a highway or trafficway. The factor common to the meaning of both a highway and a trafficway as defined in Section 102 of the Vehicle Code is that the road in question be open to the public for vehicular travel.

No evidence was presented by the Commonwealth that the Development roads were open for public use by vehicular travel as a matter of right or custom; instead, access to the Development appears to be restricted by gates and security personnel. *See* Commonwealth v. Karenbauer, 574 A.2d 716, 718 (Pa.Super. 1990) (noting that the burden of proving the defendant was driving upon a highway or trafficway for purposes of a criminal prosecution for driving under the influence is upon the Commonwealth). It also appears that the roads within the Development are on private property and privately

maintained, thereby foreclosing their designation as a highway. Accordingly, were this a case where Appellant was being prosecuted for driving under the influence on the Development roads, Appellant might well be correct that such a prosecution would fail. *See* Commonwealth v. Wyland, 987 A.2d 802 (Pa.Super. 2010) (holding that a prosecution for driving under the influence on the roads of a military base which was secured by a fence topped with barbed wire and to which public access was strictly limited to individuals who had received security clearance and who entered the base through a main checkpoint could not be sustained, the Court concluding that the roads within the base did not meet the Vehicle Code's definition of a trafficway, even though many civilians were allowed to enter the base on a daily basis), *appeal denied*, 8 A.3d 346 (Pa. 2010); *but see* Commonwealth v. Cameron, 668 A.2d 1163, 1164 (Pa.Super. 1999) (affirming a driving under the influence conviction where defendant drove through a private parking lot which was "posted as restricted for tenants only" of an eleven-story apartment building, holding that "the public use component of Section 102 can be satisfied even where access to a parking lot is restricted, but where there are a sufficient number of users," and observing that "tenants, employees, and others who have the advantage of a restricted parking facility still deserve and

expect to be protected from incidents involving serious traffic offenses").

Significantly, and critical to the instant proceedings, Appellant is not being criminally prosecuted for driving under the influence. Instead, Appellant is appealing his license suspension under Section 1547 of the Vehicle Code for his refusal to submit to chemical testing after he was arrested for driving under the influence by a state trooper. Section 1547(a) states in relevant part:

> (a) General rule.--Any person who drives, operates or is in actual physical control of the movement of a 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 vehicle:
>
> > (1) in violation of section . . . 3802 (relating to driving under influence of alcohol or controlled substance). . . .

75 Pa.C.S.A. § 1547(a)(1). Section 1547(b) provides in relevant part:

> 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 . . . for a period of 12 months.

75 Pa.C.S.A. § 1547(b)(1)(i).

The implied consent law is not a criminal statute, but a condition precedent to obtaining driving privileges in this Commonwealth, Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Bird, 578 A.2d 1345, 1348 (Pa.Cmwlth. 1990) (*en banc*), and "a license suspension stemming from a refusal to submit to chemical testing is a separate administrative proceeding." Bashore v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing, 27 A.3d 272, 275 (Pa.Cmwlth. 2011). In such a proceeding, "the lawfulness of a driver's underlying DUI arrest is irrelevant for purposes of determining whether a licensee's operating privileges were properly suspended as a consequence of the driver's refusal to submit to chemical testing under the implied consent statute." Bashore, 27 A.3d at 275 (citations and quotation marks omitted).

Further, while we agree that Section 1547(a) is limited to those instances where the police officer has reasonable grounds to believe that the driver had been driving, operating, or in actual physical control of the vehicle while on a highway or trafficway, that requirement has been met here.[2] Specifically, Trooper Gula testified that when Appellant was questioned about where he had been coming from at the time of the accident, he stated, among other things, that he was coming from a bar. *Cf.* Bashore, 27 A.3d at 275 (upholding the

suspension of a driver's license pursuant to Section 1547 where the driver was involved in a motor vehicle accident on a private gravel road marked as a "private drive" which provided access to the driveways of several residences, where the police investigation revealed that the driver was returning home from her sister's when the accident occurred). Moreover, the quantum of evidence required to support a reasonable belief is clearly not that required for proof beyond a reasonable doubt. *See* Bird, 578 A.2d at 1348 (noting that "[t]he test for determining whether reasonable grounds exists is not very demanding, nor does it require the officer to be correct in his belief"); Commonwealth, Dep't of Transp., Bureau of Traffic Safety v. Dreisbach, 363 A.2d 870, 872 (Pa.Cmwlth. 1976) (in determining whether "reasonable grounds" exist, the only valid inquiry is whether "viewing the facts and circumstances as they appeared at the time, a reasonable person in the position of the police officer could have concluded that the motorist was operating the vehicle and under the influence of intoxicating liquor").

CONCLUSION

Accordingly, because we conclude that Trooper Gula had reasonable grounds to believe Appellant had been driving, operating or in actual physical control over the movement of his vehicle while under the influence on a highway or trafficway, Appellant's refusal to submit to Trooper Gula's request for

chemical testing after his arrest justifies and mandates the suspension of his driving privileges under Section 1547 of the Vehicle Code.

BY THE COURT:

_____
P.J.

[1]By order dated January 14, 2016, we directed Appellant to provide us with a concise statement of the matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). In his Concise Statement filed on February 3, 2016, Appellant appears to raise two issues. The first – "whether [we] erred in ultimately denying [his] license suspension appeal" - is so generic it fails to identify any precise error claimed and has likely waived any error. Commonwealth v. Heggins, 809 A.2d 908, 911 (Pa.Super. 2002) (holding that "a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent to no Concise Statement at all," even if the trial court correctly guesses the issue) (citation omitted).

At the conclusion of the hearing held on June 24, 2015, we made specific findings of record none of which Appellant has challenged. (N.T., 6/24/15, pp.31-33). Further, in our order dated December 7, 2015, denying Appellant's appeal, we included an extensive footnote, supported by legal authority, explaining our decision. Given these findings made of record and the legal reasoning behind our decision, Appellant has had ample opportunity to identify with specificity what error was committed, but has failed to do so. In addressing the one issue which we have set forth in the text of this opinion, we do so because it was an issue identified at the time of hearing and is the only issue of which we are aware which may have plausible merit.

The second issue Appellant raises in his Concise Statement is that we failed to consider an unpublished memorandum opinion of the Pennsylvania Superior Court because a copy of this opinion was not provided to the court as required by Local Rule 210(5). Appellant is correct that Local Rule 210(5) requires, *inter alia*, that copies of unpublished opinions referred to in a brief be attached as an exhibit to that brief and that Appellant failed to do so. It is also true that at the time of the hearing held on June 24, 2015, Appellant's counsel referred to this unpublished memorandum opinion, that the court asked to be provided a copy of the opinion for its review, and that Appellant failed to do so. More importantly, as explained in the footnote to our December 7, 2015 order, the Pennsylvania Superior Court expressly prohibits, except in circumstances relating to the law of the case, *res judicata*, and collateral estoppel, "an unpublished memorandum decision [from being] relied upon or cited by a court or a party in any other action or proceeding." *See* Section 65.37(A), Superior Court Internal Operating Procedure, 210 Pa. Code § 65.37(A); Hunter v. Shirer US, 992 A.2d 891, 896 (Pa.Super. 2010). This is in contrast to the Commonwealth Court which allows citation to its unreported panel decisions for their persuasive value, but

not as binding precedent. *See* Section 414, Commonwealth Court Internal Operating Procedure, 210 Pa. Code § 69.414.

[2] In Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Bird, 578 A.2d 1345 (Pa.Cmwlth. 1990) (*en banc*), the Commonwealth Court held that Sections 1547(a)(1) and 3101(b) of the Vehicle Code did not need to be read together such that the police officer have reasonable grounds to believe a motorist was operating a motor vehicle on a highway before a request for chemical testing could be made. Reaffirming and quoting from its opinion in Lewis v. Commonwealth of Pennsylvania, 538 A.2d 655, 657-658 (Pa.Cmwlth. 1988), the Court stated:

> [Section 1547(a)(1) *only*] requires that the officer have reasonable grounds to believe the motorist was driving, operating or in actual physical control of a vehicle while under the influence of alcohol. It does *not* require the officer to have reasonable grounds to believe the motorist was driving, operating or in actual physical control of a vehicle *on a highway or trafficway* while under the influence of alcohol. If the legislature had intended for police officers to make such a determination, it would have specifically provided for this in the statute. (Emphasis in original.)

Id. at 1347. Critical to this decision was the language of Section 1547(a)(1) as it then existed which provided:

> (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) while under the influence of alcohol or a controlled substance or both....

75 Pa.C.S.A. § 1547(a)(1).

Significantly this language was amended in 2003. Whereas previously the language of Section 1547(a)(1) did not contain any limitation on where the driving or control of the vehicle must occur, as the statute is currently worded, the officer must have a reasonable belief that the driver was in violation of Section 3802, which implicitly incorporates the qualifications imposed by Section 3101(b)(1).

Having said this, in Bashore v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing, 27 A.3d 272 (Pa.Cmwlth. 2011), a case decided after the 2003 amendment, the Court did not interpret Section 1547(a) as requiring a reasonable belief by the police that the vehicle had been operated on a highway or trafficway. Rather, on this issue, the Court stated that it was "clear from a strict reading of the Implied Consent Law that it does not require [the police to] have reasonable grounds to believe that [the driver] was operating [the] vehicle on a highway or trafficway, but that [the officer] have 'reasonable grounds to believe [the person] to have been driving, operating or in actual physical control of the movement of a vehicle' while under the influence of alcohol." *Id.* at 275 (quoting 75

Pa.C.S.A. § 1547(a)). Obviously, under this interpretation, the strength of the case in support of suspending Appellant's operating privileges is even greater. Nevertheless, under either interpretation, it is not an element of Section 3802 that the driver be seen by the officer driving upon a highway or trafficway for the officer's belief that this had occurred to be reasonable.