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IN THE COMMONWEALTH
COURT OF PENNSYLVANIA

Cynthia Diveglia, :
Appellant :
v. : No. 1821 C.D. 2016
Commonwealth of Pennsylvania, : SUBMITTED:
Department of Transportation, : April 21, 2017
Bureau of Driver Licensing :

BEFORE: HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JULIA K. HEARTHWAY, Judge
HONORABLE BONNIE BRIGANCE
LEADBETTER, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE HEARTHWAY FILED: August 22, 2017

Cynthia Diveglia (Licensee) appeals from the October 4, 2016 order of the Court of Common Pleas of Adams County (trial court) that dismissed Licensee's appeal from the operating privilege suspension imposed by the Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (DOT) for Licensee's refusal to submit to chemical testing after her arrest for violating section 3802 of the Vehicle Code.¹ We affirm.

¹ 75 Pa. C.S. § 3802. Section 3802 of the Vehicle Code relates to driving under the influence (DUI) of alcohol or a controlled substance.

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On December 2, 2014, DOT suspended Licensee's operating privilege, effective January 6, 2015, for one year for her refusal to submit to chemical testing on November 16, 2014, in violation of section 1547(b)(1) of the Vehicle Code, 75 Pa. C.S. § 1547(b)(1), commonly referred to as the Implied Consent Law. Licensee appealed, and the trial court ultimately held a hearing on September 8, 2016.

At the hearing, DOT submitted exhibits and presented the testimony of Pennsylvania State Trooper Isaac Carlson White. Trooper White testified that on November 16, 2014, he was dispatched to locate a vehicle that was allegedly travelling erratically on North Brown's Dam Road. Trooper White located the vehicle and the individual who reported the erratic driving, who confirmed the suspect vehicle. Trooper White followed the vehicle and observed that it turned around at a dead-end, that it had a flat front passenger side tire and front right fender damage, and that it continuously swerved into the opposite lane of travel.

Trooper White followed the vehicle without using his emergency lights or siren. When Trooper White observed the vehicle travel over a blind ridge in the opposite lane of travel, he activated his emergency lights. Licensee ignored the lights and continued to drive, making a right turn, stopping momentarily, then abruptly accelerating and turning left onto State Route (SR) 94. Trooper White then activated his siren and requested assistance.

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Police from the Eastern Adams Regional Police Department (Police) responded. The Police deployed a stop strip on SR 94, which Licensee drove around and moved back into the lane of travel. Licensee then turned left onto SR 30 East and Trooper White and the Police pursued her. Licensee continued to weave in and out of lanes and Trooper White pursued her for about 10 minutes, during which time Licensee's front bumper became detached and dragged along the ground. Licensee then turned the vehicle onto SR 194 North and Trooper White and two of the Police officers used their vehicles to perform a rolling road block, ultimately stopping Licensee's vehicle.

Trooper White and the Police approached the vehicle with their weapons drawn. Trooper White opened Licensee's driver's door and holstered his weapon. Trooper White noticed a pronounced smell of alcohol and Licensee holding onto the steering wheel, staring straight ahead, and not responding. Trooper White instructed Licensee to unbuckle her seatbelt, which she ultimately did, and he helped her out of the vehicle and handcuffed her. Trooper White tried to speak with Licensee but she just mumbled words that he could not understand. He asked her why she tried to run from the police and she said "what police." He asked her if she saw the red and blue lights and the siren and she said "what lights." Trooper White again noticed a pronounced smell of alcohol coming from Licensee's breath and person.

Trooper White then removed Licensee's handcuffs to perform field sobriety tests, which Licensee

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acknowledged she understood; however, Licensee was unable to complete the tests and Trooper White had to stop them due to his concern for Licensee's safety. Trooper White observed that Licensee had glassy, bloodshot eyes and slurred her words when she tried to talk. Trooper White testified that he was aware that Licensee claimed she suffered from a medical condition; however he did not observe any physical injuries nor did he believe that her condition would interfere with her ability to perform the field sobriety testing. Licensee admitted to drinking wine and told Trooper White that she was coming from a party.

Trooper White believed Licensee was highly intoxicated, placed her under arrest for DUI, and transported her to the Gettysburg Hospital for a blood draw. During transport, Licensee informed Trooper White that she was an attorney and requested to contact her husband, who was also an attorney. Trooper White advised Licensee that she did not have the right to consult an attorney prior to the blood draw. Once at the hospital, Trooper White read Licensee the implied consent warnings and explained them to her. Trooper White then repeated the substance of the form at least three more times to Licensee. Licensee indicated that she understood the warning and had no questions. When asked to submit to the test, Licensee was belligerent, repeatedly requested to speak to her husband, and refused to submit to the test. Trooper White, after allowing Licensee sufficient time to reconsider, determined that Licensee had refused the test. Trooper

White informed Licensee of such, and transported her to the state police barracks.

After Trooper White's testimony, Licensee moved for a nonsuit based upon *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) (finding that a warrant is necessary for a blood draw), which the trial court denied. Thereafter, Licensee testified on her own behalf. Licensee stated that she drank a small glass of wine at the Longhorn Steakhouse because she did not have enough money to purchase a bottle, and then left for home. Licensee stated that she thought she had a flat tire, so she attempted to pull off the road and, in doing so, hit the curb with the right front part of her vehicle. This frightened her and she began to panic. Licensee stated that she did not pull over for the policemen because she did not know who was following her and feared a physical assault. Licensee stated that she was unaware that the police were following her until Trooper White opened her door at gunpoint.

Licensee also presented the video deposition testimony of David Ross, M.D., a neuropsychiatrist. Dr. Ross opined that Licensee was unable to recognize that police were pursuing her because of the cumulative effect of a brain injury that she had previously suffered, post-traumatic stress disorder, and the cumulative factors of the stress of the events on the evening at issue. Dr. Ross further opined that because of her mental state, Licensee was unable to make a knowing and conscious refusal to submit to the chemical testing. Dr. Ross concluded that Licensee's failure to recognize the pursuing police and her inability to knowingly consent

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were not affected by her consumption of one glass of wine on the night in question.

The trial court found Licensee's testimony to be contradictory to her description of events to Dr. Ross. The trial court found Dr. Ross's conclusions unpersuasive because they were based upon information supplied by Licensee, which the trial court found inaccurate based upon the record. The trial court found Trooper White's testimony credible that Licensee was highly intoxicated on the night in question. Further, the trial court found that Licensee's state and her dangerous driving were supported by her statement to Trooper White on the night in question that she was coming from a party where she had been drinking wine.

The trial court found that Licensee failed to rebut DOT's evidence of a conscious and knowing refusal of testing. On October 4, 2016, the trial court dismissed Licensee's appeal and reinstated her license suspension. Licensee now appeals to this Court.²

Initially, Licensee contends that the United States Supreme Court's holding in *Birchfield*, which was decided during the pendency of this appeal, requires the appeal be sustained under the Federal and State

² Our scope of review is limited to determining whether the trial court's decision is supported by substantial evidence, whether an error of law occurred, or whether the decision indicates a manifest abuse of discretion. *Stahr v. Department of Transportation, Bureau of Driver Licensing*, 969 A.2d 37, 39 n.2 (Pa. Cmwlth. 2009).

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Constitutions for Trooper White's failure to obtain a search warrant to collect a blood sample.

This Court addressed this issue in *Boseman v. Department of Transportation, Bureau of Driver Licensing*, 157 A.3d 10 (Pa. Cmwlth. 2017). In that case, we distinguished *Birchfield* because it involved criminal sanctions for refusing to submit to chemical testing, while *Boseman* involved a civil license suspension. *Boseman*, 157 A.3d at 21. We determined that "[b]y its own language,³ *Birchfield* does not apply to implied consent laws that merely impose civil penalties." *Boseman*, 157 A.3d at 21.

... *Birchfield* is distinguishable because it is not a crime to refuse chemical testing under Pennsylvania's Implied Consent Law. Further, before the enhanced criminal penalties may be imposed, the licensee or motorist must be found guilty beyond a reasonable doubt of DUI. Here, Licensee was not convicted of the DUI charge ...

However, a license suspension stemming from a refusal to submit to chemical testing is a separate administrative proceeding ... Accordingly, the lawfulness of a Pennsylvania DUI arrest is irrelevant to a determination of whether the licensee's operating privileges were properly

³ "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply ... Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." *Birchfield*, 136 S.Ct. at 2185 (citation omitted).

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suspended under the civil Implied Consent Law. In addition, the U.S. Supreme Court held in *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1988), that evidence obtained illegally in a search did not have to be excluded in an administrative proceeding. As such, the U.S. Supreme Court has not extended the federal exclusionary rule to proceedings other than criminal trials. *Id.*

... *Birchfield* addressed the constitutionality of a State statute that made it a *crime* to refuse a warrantless blood test after being arrested for DUI. In short, although *Birchfield* may have some impact in criminal DUI proceedings in Pennsylvania where enhanced penalties based on a refusal of a blood test are imposed, such is not the case before us in this civil license suspension under the Implied Consent Law.

Boseman, 157 A.3d at 19-22.

Driving in Pennsylvania is a privilege, not a right. *Krall v. Department of Transportation, Bureau of Driver Licensing*, 682 A.2d 63 (Pa. Cmwlth. 1996). In exchange for that privilege, motorists agree that their consent to chemical testing will be implied following a lawful arrest for DUI. Section 1547(a) of the Vehicle Code, 75 Pa.C.S. § 1547(a). The possibility of civil consequences resulting from a motorist's refusal to submit to a blood test after a lawful arrest for DUI does not offend the Fourth Amendment. *See Birchfield*. Accordingly, Licensee's constitutional argument fails.

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Next, Licensee contends that the trial court erred in finding that Licensee failed to rebut DOT's evidence of a conscious and knowing refusal of testing. In order to suspend a licensee's operating privilege for refusing to submit to chemical testing, DOT must establish that the licensee:

1) was arrested 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 by the police officer that a refusal would result in a revocation of his driver's license. *Department of Transportation, Bureau of Traffic Safety v. O'Connell*, 521 Pa. 242, 555 A.2d 873 (1989). Once [DOT] satisfies its burden of proof, the burden then shifts to the licensee to prove that [her] refusal was not knowing and conscious and that such inability was not caused, in whole or in part, by [her] consumption of alcohol. *Gombar v. Department of Transportation, Bureau of Driver Licensing*, 678 A.2d 843 (Pa. Cmwlth. 1996).

Hinkel v. Department of Transportation, Bureau of Driver Licensing, 715 A.2d 556, 558 (Pa. Cmwlth. 1998).

Here, DOT established that Licensee was arrested for driving under the influence of alcohol, was asked to but refused to submit to chemical testing, and had received the proper warnings. The burden then shifted to Licensee to prove that her refusal was not knowing and conscious and was not caused in whole or in part by her consumption of alcohol.

Whether the licensee was able to make a knowing and conscious refusal is factual determination that the trial court must make. *Kollar v. Department of Transportation, Bureau of Driver Licensing*, 7 A.3d 336, 340 (Pa. Cmwlth. 2010). This Court must affirm the trial court's factual findings if they are supported by sufficient evidence of record. *Id.*

Licensee argues that Dr. Ross's testimony was sufficient to establish that her refusal was not knowing and conscious. However, for Licensee to rebut DOT's case with medical evidence, her "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." *Id.* "[I]f the [licensee'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." *Id.*

The trial court, however, determined that Dr. Ross's testimony was not persuasive because it was based upon incorrect information provided by Licensee (specifically, that she only consumed a single glass of wine) and was therefore insufficient to establish that Licensee's refusal was not knowing and conscious. Licensee informed Dr. Ross that she had only one small glass of wine at a restaurant. However, Trooper White, who the trial court found credible, determined that Licensee was highly intoxicated due to her actions, her slurred speech, her reeking of alcohol, and her admission to Trooper White that she was at a party and drinking wine. (See Trial Ct. Op., at 7-8.) Thus, Trooper

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White's testimony supports the trial court's determinations. The trial court did not err in determining that Licensee failed to rebut DOT's evidence.

Accordingly, we affirm the trial court's order.

/s/ Julie K. Hearthway
JULIE K. HEARTHWAY,
Judge

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IN THE COMMONWEALTH
COURT OF PENNSYLVANIA

Cynthia Diveglia,	:
Appellant	:
v.	:
	: No. 1821 C.D. 2016
Commonwealth of Pennsylvania,	:
Department of Transportation,	:
Bureau of Driver Licensing	:

ORDER

AND NOW, this 22nd day of August, 2017, the order of the Adams County Court of Common Pleas in the above-captioned matter is affirmed.

/s/ Julie K. Hearthway

JULIE K. HEARTHWAY,
Judge

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IN THE COURT OF COMMON PLEAS
OF ADAMS COUNTY, PENNSYLVANIA
CIVIL

CYNTHIA DIVEGLIA,

Appellant

v.

COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT
OF TRANSPORTATION, BUREAU
OF DRIVER LICENSING,

2014-S-1535

Appellee

OPINION PURSUANT TO Pa. R.A.P. 1925(a)

The Appellant, Cynthia Diveglia, appeals from this Court's Order dated October 4, 2016 wherein the Court denied her appeal from the suspension of her operating privileges by the Pennsylvania Department of Transportation ("PennDOT"). Appellant challenges the trial court's ruling on three bases: (1) the United States Supreme Court's decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), requires the suspension be overturned; (2) trial court error in failing to find the consumption of alcohol did not play a role in her refusal to submit to a blood test; and (3) trial court error in the reasoning supporting affirmance of the license suspension. As the factual history is extensively set forth in this Court's Findings of Fact dated October 4, 2016, it will not be extensively repeated herein.

Appellant's first issue is triggered by the United States Supreme Court ruling in *Birchfield v. North Dakota*, *supra*. In *Birchfield*, the United States Supreme Court concluded that the threat of criminal sanctions to compel a driver to consent to a blood test rendered the consent involuntary thereby rendering the search unreasonable under constitutional safeguards. Applying the long-recognized exclusionary rule, the Supreme Court determined the fruits of such a search to be suppressible even in the context of administrative proceedings. The *Birchfield* Court further opined an individual could not be criminally punished for exercising their right to withhold consent to an unconstitutional search. In doing so, however, the Court expressly acknowledged that their decision in *Birchfield* did not cast doubt on their prior approval of implied consent laws which impose civil penalties in instances where consent is refused. *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), and *South Dakota v. Neville*, 103 S. Ct. 916 (1983). Indeed, Pennsylvania courts have followed suit of the reasoning of these federal cases. In *Faircloth v. Commonwealth, Dept. of Transp., Bureau of Driver Licensing*, 99 A.3d 583 (Pa. Cmwlth. 2014), the Commonwealth Court concluded the Fourth Amendment to the United States Constitution did not protect a licensee from the civil consequences of refusing to submit to blood testing under the implied consent law. The *Faircloth* Court reasoned the implied consent law, in a civil context, did not involuntarily compel consent but merely resulted in the forfeiture of operating privileges as a result of the refusal. In light of this precedent, this Court's rejection of Appellant's

argument is fully supported by current precedent. There is no test result to suppress in accordance with ***Birchfield*** as Appellant did not provide blood under threat of criminal punishment. Appellant rather is suffering the civil sanction of license suspension for refusing to provide a blood sample; an appropriate sanction under existing law.

Appellant next takes issue with this Court's conclusion that Appellant failed to establish the consumption of alcohol did not play a role in her refusal to submit to blood testing.¹ In considering this issue, appellate authority clearly vests the trial court with factually determining whether a motorist refused to submit to a chemical test. ***Commonwealth, Dept. of Transp., Bureau of Traffic Safety v. Humphrey***,

¹ Once the legal requirements to support a license suspension have been established, the burden shifts to the licensee to show through competent medical evidence that a medical condition prevented a knowing and conscious refusal. ***Commonwealth, Dept. of Transp., Bureau of Traffic Safety v. Humphrey***, 583 A.2d 868, 870 (Pa. Cmwlth. 1990). Appellant describes the standard imposed on the licensee as one which requires a determination as to "whether other factors played a greater role in the refusal than alcohol." In ***Kollar v. Commonwealth, Dept. of Transp., Bureau of Driver Licensing***, 7 A.3d 336 (Pa. Cmwlth. 2010), the Commonwealth Court instructed "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." *Id.* at 340 (citing ***DiGiovanni v. Dept. of Transp., Bureau of Driver Licensing***, 717 A.2d 1125, 1126 (Pa. Cmwlth. 1998)). Although one might suggest subtle differences in the two standards, this suggestion is immaterial in light of this Court's factual finding that Appellant was highly intoxicated at the time of the refusal and rejection of Appellant's expert's conclusion to the contrary.

583 A.2d at 870. In making the factual finding, it is the exclusive province of the trial court to make determinations involving credibility of witnesses. ***Gaughen, LLC v. Borough Council of Borough of Mechanicsburg***, 128 A.3d 355, 362 n.4 (Pa. Cmwlth. 2015). As such the scope of review is to determine whether or not the trial court's findings of fact are supported by substantial evidence and/or whether errors of law were committed as an appellate court is prohibited from reweighing the evidence in order to reach an opposite result. *Id.*

At hearing, Appellant introduced the testimony of a neuropsychiatrist, Dr. David Ross. Dr. Ross opined that Appellant was incapable of making a knowing and intelligent refusal and that her inability to do so was not impacted by the use of alcohol. In explaining his conclusion that alcohol did not impact her decision to refuse the chemical test, Dr. Ross stated in response to questions from Appellant's counsel as follows:

I said that I had considered her admitted use of alcohol that night, and that is her failure to recognize that the police were pursuing her and her inability to refuse consent would have occurred under the circumstances regardless of the use of alcohol or not.

So she drank one glass of wine. That had no affect [*sic*] on any of the things that happened. That's a, you know, reasonably small amount of wine. And over the time period this all happened, especially, that wouldn't have had any affect [*sic*] on the subsequent events.

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Deposition transcript of David Ross, M.D., March 29, 2016 hereafter “Tr.”), pg. 46-47. Later, under cross-examination, Dr. Ross acknowledged that large consumptions of alcohol always negatively affect a person’s cognitive abilities. Tr., pg. 62. During the same cross-examination, he reaffirmed the cornerstone for his conclusion that the consumption of alcohol did not impact Appellant’s refusal was her claim she had consumed only one glass of wine on the evening at issue. Tr., pg. 62-63. Thus, absent Appellant’s ability to establish this critical fact relied upon by Dr. Ross in formulating his conclusion, the expert opinion carries little, if any, weight. Unfortunately for Appellant, this critical fact was not established but rather was actually contradicted by credible evidence.

At hearing, the arresting Pennsylvania State Trooper opined that Appellant was highly intoxicated on the night in question.² He observed her to exhibit slurred speech, staggering gate, and glassy, bloodshot eyes while emitting a strong odor of alcohol. Moreover, the Trooper credibly described her driving as extremely erratic and dangerous yet evidencing

² Contrary to Appellant’s assertion, the effects of alcohol are so well known by our society that a layperson, including a police officer, may offer opinion as to an individual’s state of intoxication. *Commonwealth v. Hughes*, 389 A.2d 1081, 1083 (Pa. 1978) (“While a lay-witness may be qualified to express an opinion on another’s intoxication, a witness must have sufficient facts on which to base his opinion.”)). See also *Commonwealth v. Williams*, 941 A.2d 14, 27 (Pa. Super. 2008) (quoting *Commonwealth v. Kelley*, 652 A.2d 378, 382 (Pa. Super. 1994) (“A police officer may utilize both his experience and personal observations to render an opinion as to whether a person is intoxicated.”))).

calculated acts, however inartfully performed, consistent with actions which experience teaches to be associated with intoxication.

Thus, Appellant's challenge is meritless for two reasons. First, the trial court has the prerogative to accept or reject all, part, or none of any witness's testimony as being credible. *Commonwealth v. Gibbs*, 981 A.2d 274, 282 (Pa. Super. 2009). Instantly, Dr. Ross's opinion that alcohol had no impact on Appellant's refusal was rejected by the trial court as Appellant failed to establish the factual basis on which it was reached. Since Appellant has the burden of presenting credible medical testimony that her inability to make a knowing and conscious refusal of testing was not caused in whole or in part by the consumption of alcohol, her appeal fails. See *Kollar*, *supra*. Secondly, this Court actually found credible evidence that Appellant's intoxication impacted her cognitive abilities. Both of the foregoing conclusions, either individually or collectively, render Appellant's challenge meritless.

In her final claim, Appellant takes issue with a reference by this Court in the Opinion which denied the appeal. In the Opinion, this Court indicated Dr. Ross failed to offer any explanation for Appellant's erratic driving which the Court's Opinion described as "bizarre behavior." Appellant's effort at semantical surgery simply ignores the full context of the Opinion and the record upon which it was based. Findings of fact by the Court, which are supported by the record, included a finding that Appellant traveled several miles on a flat tire ultimately resulting in her riding on a bare rim. As mentioned, her driving was described by

eyewitnesses as being all over the roadway to the extent it alerted both police personnel and otherwise uninterested motorists. She eluded devices aimed at disabling her vehicle and participated in a multi-vehicle police pursuit for approximately ten minutes.

While Dr. Ross's testimony was thorough in describing her dissociative symptoms due to alleged post-traumatic stress disorder, a complete reading of his testimony reveals that he placed heavy emphasis on her description of the events to explain her cognitive behaviors. For instance, at one point in his testimony, Dr. Ross opines that the reason for her erratic driving "probably is because she had a flat tire, and then eventually the tire fell off, and she was driving on her rim." Tr., pg. 44-45. A complete reading of Dr. Ross's testimony reveals a paucity of any clear explanation of the physical manifestations exhibited by Appellant which can otherwise reasonably be described as "bizarre." Appellant's current effort to present specific references in Dr. Ross's testimony out of context of the entirety of his testimony is unpersuasive. See *American Contracting Enter., Inc. v. Workers' Compensation Appeal Board (Hurley)*, 789 A.2d 391, 396 (Pa. Cmwlth. 2001) (the opinion of medical expert must be viewed as a whole)).

Finally, in considering this issue, it simply is a red herring. Credible evidence established that the licensee: (1) was arrested for driving under the influence of alcohol by a police officer who had reasonable grounds to believe that the licensee was operating or in actual physical control of the movement of a motor vehicle

while under the influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was warned that refusal could result in a license suspension. See *Banner v. Pennsylvania, Dept. of Transp. Bureau of Driver Licensing*, 737 A.2d 1203, 1206 (Pa. 1999). As more thoroughly discussed above, this Court found credible evidence, which is supported by the record, that Appellant's erratic operation of a motor vehicle was caused by her intoxication. This Court also found the licensee did not establish that her refusal to submit to chemical testing was either unknowingly or unconsciously entered. In light of this finding of fact, Appellant's claim is not a basis for relief. Whether the Court referenced Appellant's actions and the testimony of Dr. Ross in a manner different than Appellant might have preferred does not change the result. For the foregoing reasons, the Court respectfully requests that this Court's decision be affirmed.

BY THE COURT:

/s/ MAG

MICHAEL A. GEORGE
President Judge

Date filed: December 6, 2016

App. 21

IN THE COURT OF COMMON PLEAS
OF ADAMS COUNTY, PENNSYLVANIA
CIVIL

CYNTHIA DIVEGLIA,

Petitioner

v.

**COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT
OF TRANSPORTATION, BUREAU
OF DRIVER LICENSING,**

2014-S-1535

Respondent

FINDINGS OF FACT

(Filed Oct. 4, 2016)

1. On November 16, 2014 at approximately 10:49 p.m., Trooper Mac White was dispatched to a report of an erratic driver traveling northbound on State Route 94 in Adams County, Pennsylvania. Trooper White was provided with a description of the vehicle including the license plate number. He was further advised that the individual reporting the erratic driving remained in contact with the vehicle.

2. Trooper White responded to the location and observed the suspect vehicle on North Browns Dam Road, Hamilton Township, Adams County.

3. North Browns Dam Road is a dead-end roadway. When he observed the suspect vehicle, it was turning around at the dead-end.

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4. Also located near the scene was the individual who reported the erratic driving. The witness confirmed to Trooper White the suspect vehicle was the vehicle which prompted the complaint.

5. Trooper White observed the suspect vehicle as it passed his location. He turned around and began following it without initiating emergency lights or siren. He observed the vehicle to have a flat front passenger side tire and front right fender damage.

6. While following the suspect vehicle, Trooper White noted the vehicle was continuously driving in the opposite lane of travel to the extent it was almost on the opposite berm.

7. After observing the vehicle traveling in the opposite lane of travel over a blind ridge, Trooper White activated his emergency lights.

8. The suspect vehicle did not respond to the emergency lights but rather continued to travel at 25-30 miles per hour.

9. The suspect vehicle eventually made a right onto Fawn Avenue. While on Fawn Avenue, the vehicle stopped momentarily for approximately three seconds then accelerated in an abrupt manner.

10. The suspect vehicle turned left onto State Route 94 southbound and accelerated to approximately 35-40 miles per hour. Trooper White activated his siren and alerted additional law enforcement for assistance.

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11. Eastern Adams Regional Police deployed a stop strip in the southbound lane of State Route 94 just prior to the intersection of State Route 94 and State Route 30. As the suspect vehicle approached the stop strip, it moved into the left lane and successfully avoided contact with the stop strip.

12. At the intersection of State Route 94 and State Route 30, the vehicle turned left to proceed east-bound on State Route 30.

13. On State Route 30, two Eastern Adams Regional Police vehicles joined the pursuit.

14. Throughout the pursuit, Trooper White observed the suspect vehicle to be "all over the roadway" causing numerous vehicles traveling in the opposite direction to take evasive action to avoid collision.

15. The pursuit traveled several miles and lasted approximately 10 minutes. As the pursuit progressed, Trooper White observed the suspect vehicle to consistently be traveling at approximately 50 miles per hour.

16. During the pursuit, the front bumper had become detached and was dragging along the ground.

17. Ultimately, the suspect vehicle turned north-bound on State Route 194 at which time the three pursuing police vehicles performed a rolling roadblock of the suspect vehicle. Trooper White's vehicle was positioned behind the suspect vehicle while one of the Eastern Adams Regional Police vehicles moved to the front of the suspect vehicle and the other traveled alongside the suspect vehicle leaving no possible exit.

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18. While the maneuver was being performed, Trooper White observed the suspect vehicle take evasive actions in an effort to evade the Eastern Adams Regional Police vehicles. The suspect vehicle was ultimately stopped without making contact to any other vehicle.

19. After effectuation of the stop, the pursuing police officers unholstered their weapons and approached the vehicle.

20. Trooper White opened the operator's door and immediately smelled the pronounced odor of alcohol.

21. Cynthia Diveglia was the operator of the motor vehicle and stared straight ahead without response to the trooper. When she was asked by the trooper to unbuckle her seatbelt, she complied with the request.

22. After being removed from the vehicle, Diveglia was handcuffed. She was mumbling to herself and the trooper had difficulty understanding what she was saying. When asked why she was "running from the police," Diveglia responded "What police, what lights?"

23. Trooper White initiated field sobriety tests which, after explanation, Diveglia acknowledged that she understood. She failed however to follow the instructions and was unable to successfully complete the tests. Trooper White stopped the tests for Diveglia's safety.

24. Trooper White observed Diveglia to have glassy and bloodshot eyes, very slurred speech, and

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extreme difficulty in walking and standing. She indicated to the trooper that she had consumed wine and was coming from a party.

25. Trooper White is a three-year veteran of the Pennsylvania State Police and, at the time of the traffic stop, was involved in approximately 7-10 driving under the influence of alcohol incidents. Additionally, he was familiar with the effects of alcohol from his own personal social experiences.

26. Based upon his training and experience, Trooper White credibly opined that Diveglia was highly intoxicated. He placed her under arrest for driving under the influence of alcohol and transported her to Gettysburg Hospital for a blood test.

27. Although Trooper White became aware that Diveglia was claiming to suffer from a medical condition, he did not observe any physical injuries to her nor considered her complaint of a medical condition to be of the type that would interfere with her ability to perform field sobriety testing.

28. During transport to Gettysburg Hospital, Diveglia accurately informed the trooper that she was an attorney. She also requested to contact her husband who she also accurately identified as an attorney. Trooper White advised that she did not have the right to consult with counsel prior to the blood test.

29. Once at the hospital, Trooper White escorted Diveglia inside. In front of the nurse performing the blood draw, Trooper White read Diveglia her implied

consent rights specifically reading the Pennsylvania Department of Transportation Form DL26 to her. In addition to reading the form, he explained the form's meaning in plain language and repeated the substance of the form at least three or more times. The exchange lasted approximately 5-10 minutes.

30. Diveglia indicated to the trooper that she understood the warning and had no additional questions.

31. In response to the trooper's request to perform blood test, Diveglia was belligerent and adamant in requesting to speak to her husband and advising that she was not going to submit to the test.

32. Trooper White, after providing Diveglia with sufficient opportunity to change her mind, determined she was refusing the test. Thereafter, he transported her to the state police barracks.

DISCUSSION

In order to sustain a suspension for refusal of a blood alcohol test, the Department of Transportation must establish that the licensee: (1) was arrested for driving under the influence of alcohol by a police officer who had reasonable grounds to believe that the licensee was operating or in actual physical control of the movement of a motor vehicle while under the influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was warned that refusal might result in a license suspension. ***Banner v. Pennsylvania, Dept. of Transp., Bureau of Driver***

Licensing, 737 A.2d 1203, 1206 (Pa. 1999). Once the Department carries this burden, the licensee must then establish that the refusal was either not knowingly or consciously entered or that the licensee was physically unable to perform the test. **Kollar v. Pennsylvania, Dept. of Transp., Bureau of Driver Licensing**, 7 A.3d 336, 339 (Pa. Cmwlth. 2010). As evidence at hearing was more than sufficient to satisfy the Department's burden, resolution of the issue before the Court depends upon the determination of whether Diveglia's refusal was not a conscious and knowing decision. The resolution of this issue is a factual one to be made by the trial court and one which the motorist must establish by the sufficiency of the evidence. **Barbour v. Pennsylvania, Dept. of Transp., Bureau of Driver Licensing**, 732 A.2d 1157, 1160 (Pa. 1999).

At hearing, Diveglia testified on November 16, 2014, she traveled to the Longhorn Steakhouse to purchase a bottle of wine. Upon entering the restaurant, she discovered she only had \$9 in her pocket as she did not have her wallet. Therefore, since she did not have the money to buy a bottle of wine, she sat at the restaurant and drank a small glass of wine. After consuming the wine, she left the restaurant to return home. She claimed that when she left the parking lot, she felt like she had a flat tire but believed she could make it home. When it became apparent to her that she could not, she attempted to pull off the road however, in doing so, struck a culvert with the right front part of her vehicle. She claimed to have been frightened by this and started to panic. As she continued on her way, she

frantically searched the car for her purse. At some point, she observed a vehicle following her which caused her to further panic as she did not know the intent of the vehicle which followed her. She did not pull over because she was afraid whoever was operating the other vehicle would physically assault her. After this last thought, she claims to have a sketchy memory of the next occurrences. She says she never saw the flashing lights nor heard the siren and first realized police were attempting to stop her when the trooper opened her door at gunpoint.

Diveglia also presented the video testimony of David Ross, M.D. Dr. Ross is a neuropsychiatrist. He opined to a reasonable degree of medical certainty that on November 16, 2014, Diveglia was unable to recognize that police were pursuing her because of the cumulative effect of brain injury she had previously suffered, post traumatic stress disorder, and cumulative factors of the stress of the events on the evening at issue. He further opined that because of her stressed mental state, she was incapable of making a knowing and intelligent refusal to submit to the blood alcohol testing. He concluded that based upon her claim of consuming only a single small glass of wine, her failure to recognize the pursuing police and her inability to knowingly consent was not affected by her use of alcohol on the night of the incident.

Interestingly, during the neuropsychiatric evaluation performed by Dr. Ross as evidenced by his report, Diveglia offered factual information of the incident which is slightly different than her hearing testimony

as she described to Dr. Ross additional aspects of her driving. For instance, she claimed that although she could not recall taking evasive action to drive around the deployed stop strip, it was possibly a coincidence that she avoided it as, at that same location, she remembered moving to the left lane to make a left turn.¹ Additionally, contrary to the testimony of Trooper White and her hearing testimony that she was unaware of police presence until they opened her car door, she advised Dr. Ross she was confident that she did not attempt to evade the rolling road block. Her claim to Dr. Ross that she could have passed the police vehicle on her left side if she wished to do so also contradicts her hearing testimony.² Unquestionably, her description of events to Dr. Ross contained much more detail than what she claimed she could remember during her testimony at hearing.³

In *Kollar*, the Commonwealth Court summarized the relevant legal considerations which apply instantly as follows:

A drivers 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

¹ Petitioner's Exhibit 4, page 18.

² Petitioner's Exhibit 4, page 19.

³ See Petitioner's Exhibit 4, pages 18-19 wherein Diveglia explains to Dr. Ross an estimate of her speed and the reason for her erratic driving.

order to establish a licensee who is 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.

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

As mentioned, Diveglia presented the medical testimony of Dr. Ross in support of her claim that she did not consciously or knowingly refuse the blood alcohol test. The Department, on the other hand, claims that Dr. Ross's testimony does not credibly support the conclusion that Diveglia's refusal was not knowingly and consciously entered.⁴ In resolving this dispute, it is not necessary to determine whether Dr. Ross's conclusions are credible. The Court accepts, based upon the facts assumed by Dr. Ross in reaching his conclusions, that

⁴ The Respondent has challenged the medical testimony alleging Dr. Ross did not testify to a reasonable degree of medical certainty and was equivocal in his testimony. This argument is rejected as his testimony at hearing was supplemented by the admission of his report which unequivocally expresses the opinions discussed above to a reasonable degree of medical certainty. See Petitioner's Exhibit 4.

they are accurate. However, the conclusions reached by Dr. Ross are unpersuasive in supporting Diveglia's burden.

It is beyond reproach that the opinion of an expert is only as accurate as the accuracy of the information upon which it is based. See *Collins v. Hand*, 246 A.2d 398, 404 (Pa. 1968) (an expert cannot base an opinion on facts which are not warranted by the record)). If the facts, as determined by the fact-finder, are contrary to those assumed by the expert, the expert's opinion is entitled to no weight and should be disregarded. The cornerstone of Dr. Ross's conclusion that Diveglia's "admitted" use of alcohol on the night of the incident had no impact on her inability to consciously refuse consent rests entirely on her claim that she drank only one glass of wine. Unfortunately for Diveglia, her claim is contrary to the factual conclusions reached by this Court as fact-finder.

At hearing, Trooper White credibly opined that Diveglia was highly intoxicated on the night in question. He observed her to exhibit slurred speech, staggering gait and glassy, bloodshot eyes while emitting a strong odor of alcohol: all of which is unexplained by the opinion of Dr. Ross and inconsistent with a single glass of wine. Moreover, her driving, as credibly described by Trooper White, was extremely erratic and dangerous yet evidenced calculated acts, however inartfully performed, consistent with actions which experience teaches to be associated with intoxication. Notably, Dr. Ross's opinion fails to offer any explanation for this bizarre behavior. To the contrary, his

report mentions her self-serving explanation that the erratic driving was caused "due to driving on the rim" and her claim that "[s]he thought it was possible that her neuropsychiatric symptoms led to her driving on the opposite side of the road."⁵ but never adopts the same or reaches such a conclusion to a reasonable degree of medical certainty. Her physical manifestations as well as the erratic and dangerous driving is supported by her statement to Trooper White that on the night of the incident, she was at a party and drinking wine.

Having found as a matter of fact that Diveglia was highly intoxicated on the night of the incident, Dr. Ross's opinion that alcohol had no part in her refusal to submit to blood testing carries no weight. Absent the Court's acceptance of Dr. Ross's conclusions, Diveglia has failed to carry her burden as she has failed to establish the consumption of alcohol did not play a role in her refusal. See *Kollar*, 7 A.3d at 340-41.

For the foregoing reasons, the attached Order is entered.

⁵ Dr. Ross evaluation, page 18.

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ORDER OF COURT

AND NOW, this 4th day of October, 2016, the appeal in this matter is dismissed, and the appealed suspension is reinstated.

BY THE COURT:

/s/ MAG

MICHAEL A. GEORGE
President Judge

Craig A. Sopin, Esquire
Philip M. Bricknell, Esquire
jvs

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION
Bureau of Driver Licensing
Mail Date: DECEMBER 02, 2014

CYNTHIA ANNE DIVEGLIA WID # 143296739914196
41 BERKY RD 001
EAST BERLIN PA 17316
PROCESSING DATE 11/25/2014
DRIVER LICENSE
[REDACTED]
DATE OF BIRTH [REDACTED]

Dear MS. DIVEGLIA:

This is an Official Notice of the Suspension of your Driving Privilege as authorized by Section 1547B11 of the Pennsylvania Vehicle Code. As a result of your violation of Section 1547 of the Vehicle Code, CHEMICAL TEST REFUSAL, on 11/16/2014:

- Your driving privilege is **SUSPENDED** for a period of **1 YEAR(S)** effective **01/06/2015** at 12:01 a.m.

COMPLYING WITH THIS SUSPENSION

You must return all current Pennsylvania driver's licenses, learner's permits, temporary driver's licenses (camera cards) in your possession on or before 01/06/2015. You may surrender these items before, 01/06/2015, for earlier credit; however, you may not drive after these items are surrendered.

YOU MAY NOT RETAIN YOUR DRIVER'S LICENSE FOR IDENTIFICATION PURPOSES.

However, you may apply for and obtain a photo identification card at any Driver License Center for a cost of \$27.50. You must present two (2) forms of proper identification (e.g., birth certificate, valid U.S. Passport, marriage certificate, etc.) in order to obtain your photo identification card.

You will not receive credit toward serving any suspension until we receive your license(s). Complete the following steps to acknowledge this suspension.

1. Return all current Pennsylvania driver's licenses, learner's permits and/or camera cards to PennDOT. If you do not have any of these items, send a sworn notarized letter stating you are aware of the suspension of your driving privilege. You must specify in your letter why you are unable to return your driver's license. Remember: You may not retain your driver's license for identification purposes. Please send these items to:

Pennsylvania Department of Transportation
Bureau of Driver Licensing
P.O. Box 68693
Harrisburg, PA 17106-8693

2. Upon receipt, review and acceptance of your Pennsylvania driver's license(s), learner's permit(s), and/or a sworn notarized letter, **PennDOT will send you a receipt confirming the date that credit began. If you do not receive a receipt from us within three (3) weeks, please contact our office. Otherwise, you will not be**

given credit toward serving this suspension.

PennDOT phone numbers are listed at the end of this letter.

3. If you do not return all current driver license products, we must refer this matter to the Pennsylvania State Police for prosecution under SECTION 1571(a)(4) of the Pennsylvania Vehicle Code.

PAYING THE RESTORATION FEE

You must pay a restoration fee to PennDOT to be restored from a suspension/revocation of your driving privilege. To pay the applicable restoration fee, payment can be made at anytime online @ www.dmv.state.pa.us or mailed to the address listed below. Please include your driver number on your check, money order or correspondence.

Pennsylvania Department of Transportation
Bureau of Driver Licensing
P.O. Box 68693
Harrisburg, PA 17106-8693

The Restoration Fee is based on the Consumer Price Index and subject to change. For the current restoration fee amount due, please visit PennDOT's website at www.dmv.state.pa.us to obtain a copy of your restoration requirements letter. If you do not have Internet access, please call PennDOT's Customer Care Center at 1-800-932-4600 to request a copy of your restoration requirements letter.

Please note: Paying the restoration fee **DOES NOT** satisfy the requirement to acknowledge your

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suspension/revocation. If you have not acknowledged your suspension/revocation, please follow the instructions listed under "Complying with this Suspension/Revocation".

APPEAL

You have the right to appeal this action to the Court of Common Pleas (Civil Division) within 30 days of the mail date, DECEMBER 02, 2014, of this letter. **If you file an appeal in the County Court, the Court will give you a time-stamped certified copy of the appeal.** In order for your appeal to be valid, you must send this time-stamped certified copy of the appeal by certified mail to:

Pennsylvania Department of Transportation
Office of Chief Counsel
1101 South Front Street
Third Floor, Riverfront Office Center
Harrisburg, PA 17104-2516

Remember, this is an **OFFICIAL NOTICE OF SUSPENSION**. You must return all current Pennsylvania driver license products to PennDOT by 01/06/2015.

Sincerely,

/s/ Kara N. Templeton
Kara N. Temple, Director
Bureau of Driver Licensing

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INFORMATION 8:00 a.m. to 5:00 p.m.

IN STATE	1-800-932-4600
TDD IN STATE -	1-800-228-0676
OUT-OF-STATE	717-412-5300
TDD OUT-OF-STATE	717-412-5380
WEB SITE ADDRESS	www.dmv.state.pa.us

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Cynthia Diveglia,	:	
	:	
Appellant	:	
	:	
v.	:	
	:	No. 1821 C.D. 2016
Commonwealth of	:	
Pennsylvania, Department	:	
of Transportation, Bureau	:	
of Driver Licensing	:	
	:	

ORDER

NOW, October 11, 2017, having considered appellant's application for reargument, the application is denied.

/s/ Mary Hannah Leavitt
MARY HANNAH LEAVITT,
Presiding Judge

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

CYNTHIA DIVEGLIA,	: No. 762 MAL 2017
Petitioner	: Petition for
v.	: Allowance of Appeal
COMMONWEALTH OF	: from the Order of the
PENNSYLVANIA, DEPARTMENT	: Commonwealth Court
OF TRANSPORTATION, BUREAU	:
OF DRIVER LICENSING,	:
Respondent	:

ORDER

PER CURIAM

AND NOW, this 10th day of April, 2018, the Petition for Allowance of Appeal is **DENIED**.
