76 Mass.App.Ct. 1117
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

COMMONWEALTH
v.
Brian McCORMACK.

No. 08–P–1840. | March 8, 2010.

West KeySummary

1 **Automobiles**
Reinstatement or New License

A judge did not err in denying a driver's motion to restore his driver's license which was revoked because he refused to submit to a breathalyzer test. The State rebutted the statutory presumption that the driver's license should be restored by establishing that restoration of the driver's license would likely endanger the public safety. The driver had two prior convictions of operating under the influence of intoxicating liquor and other convictions that involved alcohol which indicated that there was a likelihood of danger to the public from restoration of the driver's license. M.G.L.A. c. 90, § 24(1)(f)(1).

Cases that cite this headnote

By the Court (DUFFLY, GRASSO & HANLON, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The defendant appeals from an order of the District Court denying his motion to restore his driver's license and from the denial of a motion to reconsider. We affirm. [1]

1. *Background.* On May 8, 2006, the defendant was charged with operating under the influence of alcohol, third offense. On June 19, 2007, he was found not guilty of that charge after a bench trial. Because the defendant had refused to submit to a breathalyzer test, his license had been suspended in accordance with G.L. c. 90, § 24(1)(*f*)(1). Immediately following his acquittal, the defendant moved to restore his driver's license pursuant to the statute, but he did not go forward on the motion at that time. [2]

On May 2, 2008, the defendant again moved to restore his driver's license. [3] After hearing, the judge denied the motion. In his written findings, the judge noted that the Commonwealth had rebutted the statutory presumption that the defendant's license should be restored by establishing that restoration of the defendant's license would likely endanger the public safety. The judge found support for this conclusion in the defendant's two prior convictions of operating under the influence, a prior conviction of operating so as to endanger, [4] and convictions of other alcohol related offenses, including a recent conviction of assault and battery by means of a dangerous weapon. [5]

2. *Discussion.* The judge did not err in denying the defendant's motion to restore his driver's license or the defendant's motion to reconsider. The governing statute, G.L. c. 90, § 24(1)(*f*)(1), as amended by St.1994, c. 25, § 5, provides in pertinent part:

> "[T]he defendant may immediately, upon the entry of a not guilty finding ... and in the absence of any other alcohol related charges pending against [him], apply for and be immediately granted a hearing before the court which took final action on the charges for the purposes of requesting the restoration of said license. At said hearing, there shall be a rebuttable presumption that said license be restored, unless the [C]ommonwealth shall establish, by a fair preponderance of the evidence, that restoration of said license would likely endanger the public safety."

Preliminarily, we disagree with the Commonwealth that the judge erred in granting the defendant a hearing in May, 2008, or that the defendant's motion was untimely because he had not proceeded on the motion filed immediately following acquittal. In that regard, the statute speaks in permissive ("may"), not mandatory terms, and the defendant correctly recognized that the pendency of an alcohol related charge of assault and battery by means of a dangerous weapon

precluded proceeding on his motion until that charge was resolved. We also disagree with the Commonwealth that after the defendant was convicted of assault and battery by means of a dangerous weapon, the charge remained "pending" by virtue of a probationary sentence, thereby precluding the judge from granting the defendant a hearing on his motion to restore his license. [6]

***2** Nevertheless, we ultimately agree with the Commonwealth that in considering whether the Commonwealth rebutted the presumption that restoration of the defendant's license would likely endanger the public safety by a fair preponderance of the evidence, the judge could permissibly consider, as he did, the defendant's entire record of convictions, including his two prior convictions of operating under the influence of intoxicating liquor. We discern nothing improper in considering the defendant's past record of drunk driving convictions as part of the evidence of the likelihood of danger to the public from restoration of the defendant's license. [7] Such danger does not dissipate entirely with the defendant's acquittal of the new charge. By its own terms, the statute imposes longer periods of suspension for refusals by those with prior convictions of operating under the influence of intoxicating liquor than for those without such prior convictions. See G.L. c. 90, § 24(1)(*c*) (1)-(1)(*c*)(4).

Even were we to assume that the defendant's record of prior convictions of operating under the influence by itself is insufficient to rebut the presumption that the defendant's license should be restored, the judge did not rely on those convictions alone in concluding that restoration of the defendant's license would likely endanger the public. He relied as well on the defendant's conviction of other alcohol related offenses, including operating so as to endanger and a recent conviction of assault and battery by means of a dangerous weapon in which the defendant's use of alcohol played a role.

There is no merit to the defendant's contention that the motion judge, who found the defendant not guilty of operating under the influence of alcohol at a bench trial, was biased against him in dealing with the motion to restore the license. By its very terms, G.L. c. 90, § 24(1)(*f*)(1), requires the same judge who presided at the acquittal on the charge of operating under the influence to consider whether restoration of the defendant's license would endanger the public safety. In so providing, the Legislature expressed a considered judgment that the trial judge would be in the best position to gauge the danger to public safety posed by restoration. The judge was not constrained solely by the Commonwealth's arguments, but could permissibly rely upon the court's own records of the defendant's convictions of alcohol and other offenses that are probative of the likely danger to public safety upon restoration of the defendant's license. See *Commonwealth v. Thurston,* 53 Mass.App.Ct. 548, 554, 760 N.E.2d 774 (2002).

Order denying motion to restore license to operate a motor vehicle affirmed.

Order denying motion to reconsider affirmed.

Parallel Citations

922 N.E.2d 862 (Table), 2010 WL 759136 (Mass.App.Ct.)

Footnotes

1 While his appeal from the initial denial was pending in this court, the defendant sought a stay to seek reconsideration which we granted. Subsequently, the District Court judge denied the defendant's motion to reconsider. The defendant appealed the denial of his motion to reconsider. We consolidated the appeals.

2 That the defendant did not go forward at that time was owing, no doubt, to the fact that he was awaiting trial on a subsequent charge of assault and battery by means of a dangerous weapon on May 21, 2007.

3 On February 12, 2008, the defendant was found guilty of assault and battery by means of a dangerous weapon on May 21, 2007, and placed on probation for one year.

4 The conviction of operating so as to endanger occurred in conjunction with the defendant's 1999 conviction of operating under the influence of intoxicating liquor.

5 The record establishes the alcohol related nature of this incident. After drinking alcohol at a friend's home, the defendant became involved in an argument, picked up a rock, and struck the victim over the eye.

6 The defendant's motion to reconsider was heard subsequent to expiration of that probation.

7 This is especially so where one of those convictions occurred in conjunction with a conviction of operating to endanger.

922 N.E.2d 862

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