2010 WL 2171145

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eleventh District, Lake County.

City of EASTLAKE, Plaintiff-Appellant,
v.
Caroline E. KOMES, Defendant-Appellee.

No. 2009-L-096. | Decided May 28, 2010.

Synopsis
Background: After driver was found not guilty of operating a motor vehicle under the influence, driver sought to reverse administrative license suspension. The Willoughby Municipal Court, No. 09 TRC 00211, terminated the suspension. City appealed.

Holding: The Court of Appeals, Lake County, Mary Jane Trapp, P.J., held that driver was not informed of the consequences of refusing breath test, and was entitled to termination of administrative license suspension.

Affirmed.

West Headnotes (1)

[1] **Automobiles**
Refusal to Take Test
Automobiles
Refusal of Test

Evidence was sufficient to support trial court finding that officer, on stopping driver for driving under the influence of alcohol, failed to inform driver of the consequences of refusing breath test, such that driver was entitled to termination of administrative license suspension; driver's contention that she was misinformed as to the consequences of refusing to take breath test was not rebutted, form given to driver was incorrect and outdated version, and no one testified as to how the outdated form was "similar" to current form, such that there was no prima facie proof that proper procedure was followed. R.C. § 4511.197(C).

Cases that cite this headnote

Criminal Appeal from Willoughby Municipal Court, Case No. 09 TRC 00211.

Attorneys and Law Firms

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Kenneth A. Bossin, Mayfield Heights, OH, for defendant-appellee.

Opinion

MARY JANE TRAPP, P.J.

***1** {¶ 1} The city of Eastlake appeals the judgment of the Willoughby Municipal Court, which granted Ms. Caroline E. Komes' appeal of her administrative law suspension ("ALS") after a jury found her not guilty of operating a motor vehicle under the influence ("OVI").

{¶ 2} ***Substantive and Procedural Facts***

{¶ 3} On the snowy night of January 10, 2009, Ms. Komes turned onto East 337th from Curtis Boulevard. City of Eastlake Police Officer Richard Greer was stopped at the red light on East 337th and observed Ms. Komes turn from Curtis Boulevard, fishtailing her vehicle. Her vehicle then slid to the right and struck a curb before she gained control and continued driving.

{¶ 4} The observation prompted Officer Greer to pull Ms. Komes to the side of the road for questioning. When he approached the vehicle, he noted the smell of alcohol emanating from the car and Ms. Komes' person. In plain view on the rear seat of the car, next to the backseat passenger, was a twelve-pack of canned beer and a six-pack of bottled beer. Both of the two passengers in the car were over the age of twenty-one.

{¶ 5} Officer Greer administered three field sobriety tests solely to Ms. Komes before concluding that she should be taken to the station for a breathalyzer test. Upon her refusal to

take the breathalyzer test, she was arrested and charged with operating a vehicle while impaired, being a person under the age of twenty-one years and under the influence of alcohol, and being a person under the age of twenty-one years and possessing or consuming beer or intoxicating liquor. The last two charges were dismissed, and the OVI was tried before a jury. She was found not guilty.

{¶ 6} Ms. Komes then appealed her ALS and after a hearing, the trial court terminated the suspension.

{¶ 7} The city of Eastlake now appeals Ms. Komes' terminated suspension, raising one assignment of error:

{¶ 8} "The court erred in granting Defendant/Appellee's ALS appeal when the arresting officer informed the Defendant of all the requisite information prior to Defendant's refusal to submit to a breathalyzer."

{¶ 9} ***Administrative License Suspension***

{¶ 10} In the city of Eastlake's sole assignment of error, it contends that the trial court erred in terminating Ms. Komes' suspension because the officer complied with the notification requirements associated with the breathalyzer test. The officer, however, used the wrong iteration of the Bureau of Motor Vehicles' form, and in fact, no evidence was submitted by the city to substantiate its assertion that the officer properly informed Ms. Komes of the consequences of refusal.

{¶ 11} "[A]n appeal of an ALS is a civil proceeding, and appellant bears the burden of proving, by a preponderance of evidence, that the conditions for an ALS have not been met." *State v. Williams*, 11th Dist. No.2001-P-0112, 2002-Ohio-6920, ¶ 10, quoting R.C. 4511.191(H)(2) [now R.C. 4511.191(D)].

***2** {¶ 12} At the hearing, Ms. Komes' counsel argued that the basis of her appeal was that the officer did not use the proper iteration of the BMV form, and thus, the instructions that were read to her regarding consequences upon refusal were not those required by the language of the statute in effect on the date of the offense. Specifically, counsel noted the form utilized by the officer did not contain the newly added third paragraph regarding prior offenses and authorization to use "reasonable means" to ensure submission to a chemical test. He further argued the form was incomplete as it was unsigned, did not contain a witness' signature, and was not notarized.

{¶ 13} The city of Eastlake simply denied the allegations, arguing that the form contained in the court record of Ms. Komes' criminal trial was signed by both the officer and Ms. Komes, notarized, and that the "warnings that were given to the defendant at the time was [sic] sufficient pursuant to statute." No testimony was offered as to the precise wording of the notification that was given to Ms. Komes that night.

{¶ 14} Ms. Komes' counsel admitted that she was not necessarily prejudiced by the use of an outdated form containing an incomplete recitation of the statutorily required warnings. Counsel argued, however, that because the officer was required to read the most current iteration, his client was not made fully aware of the consequences of a refusal. The prosecutor again repeated that she did not believe there was a difference. After considering the evidence and arguments, the court granted the motion terminating the ALS.

{¶ 15} **An Appeal of an Administrative License Suspension**

{¶ 16} "When a person appeals an ALS before the trial court, the scope of that appeal is limited to:

{¶ 17} "(1) whether the officer had reasonable grounds to believe that the defendant was driving under the influence of alcohol or with a prohibited concentration of alcohol in the blood, breath, or urine; (2) whether defendant was placed under arrest; (3) whether the officer requested the defendant to submit to a chemical test; (4) whether the officer informed the defendant of the consequences of either refusing the test or of submitting to it; and (5) whether the defendant refused to submit to the test or failed it ." *Williams* at ¶ 9; R.C. 4511.197(C).

{¶ 18} Our review of the sparse record reveals that the trial court's judgment is supported by a preponderance of the evidence because the city of Eastlake did not rebut the fact that Ms. Komes was misinformed of the consequences of a refusal. While the 2255 BMV form contained in Ms. Komes' file from the criminal trial was properly notarized and signed by a witness, Ms. Komes, and the officer, there is no doubt the form was incorrect as the 2006 version was submitted instead of the 2008 version.

{¶ 19} The prosecutor offered the incorrect form as contained in the record of Ms. Komes' criminal case as prima facie proof that the proper procedure was followed, but the actual form

was not offered during the hearing. The officer did not testify and the prosecutor merely argued that the forms were similar, but did not even indicate how. This simply does not suffice.

***3** {¶ 20} The Supreme Court of Ohio has held that "[f]or purposes of establishing a valid consent or refusal to take a breath-alcohol-concentration test in the context of an administrative license suspension pursuant to R.C. 4511.191, the notice requirement of R.C. 4511.191(C) is satisfied by reading to the arrestee the language of R.C. 4511.191(C)(2)(b) as set forth on the top portion of BMV Form 2255." *City of Bryan v. Hudson* (1997), 77 Ohio St.3d 376, 378, 674 N.E.2d 678. Thus, the city of Eastlake was required to "establish such prima facie proof either through the arresting officer's sworn report * * * or through the officer's sworn testimony at a hearing held during the appeal from the administrative license suspension." *State v. Clinger*, 4th No. 04CA788, 2005-Ohio-2277, ¶ 19. See, also, *Langen v. Caltrider* (Aug. 20, 1998), 2d No. 17698, 1999 Ohio App. LEXIS 3828, 11 (defect was cured during the ALS hearing when the arresting officer testified under oath about each and every one of the matters which R .C. 4511.191(D)(1)(c) requires the sworn report to contain); *State v. Allen*, 3d No. 13-09-25, 2010-Ohio-1257, ¶ 16 (when the arresting officer submits the report unsworn, the testimony of the officer at the subsequent judicial proceedings may serve as prima facie proof of the statutory requirements contained in the report).

{¶ 21} Ms. Komes, by a preponderance of the evidence, presented sufficient evidence that not all of the consequences of refusal in effect as of the date of the offense were read to her pursuant to the current form. The sworn report was not offered into evidence and the city only referred to the record from Ms. Komes' criminal trial. The prosecutor failed to attempt to cure the use of an outdated, incomplete form by submitting the testimony of the arresting officer. That the city of Eastlake now submits a transcript of the officer's testimony from Ms. Komes' criminal trial is of no consequence, as it should have been submitted at the hearing, and the officer never testified as to the statutory requirements of the report, namely all the consequences of refusal as required by the statute. With nothing more than a bare averment that the forms are "similar," neither we nor the trial court have before us an adequate recitation as to what consequences of refusal were explained to Ms. Komes. Without more, we cannot say that Ms. Komes was adequately informed.

{¶ 22} As neither the form nor the officer's sworn testimony were introduced as evidence at the hearing, we find the city of Eastlake's sole assignment of error without merit and affirm the judgment of the Willoughby Municipal Court.

CYNTHIA WESTCOTT RICE, and COLLEEN MARY O'TOOLE, JJ., concur.

Parallel Citations

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