

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-11-071

Appellee

Trial Court No. TRC 1005126

v.

Brad McPhillamy

DECISION AND JUDGMENT

Appellant

Decided: August 10, 2012

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Troy D. Wisheart, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Brad McPhillamy, appeals the July 5, 2011 judgment of the Erie County Municipal Court which denied his request for an administrative license suspension hearing. Because we find that the request was untimely, we affirm.

{¶ 2} On October 26, 2010, in Erie County, Ohio, appellant was the subject of a traffic stop during which he was charged with having weapons while under a disability, improperly handling firearms in a motor vehicle, operating a vehicle while under the influence of alcohol (“OVI”), and refusal to submit to a chemical test. Appellant was immediately placed on an administrative license suspension (“ALS”). After first appearing in Erie County Municipal Court on October 29, 2010, on or about November 15, 2010, appellant’s case was bound over to the Erie County Court of Common Pleas to present to the grand jury. In December 2010, the grand jury failed to indict appellant on the OVI charge.

{¶ 3} On June 22, 2011, appellant filed a motion requesting that the Erie County Municipal Court set a hearing on appellant’s ALS. On July 5, 2011, the court denied the motion stating that because the matter was referred to the Erie County Grand Jury, the court lacked jurisdiction to conduct any further proceedings. This appeal followed.

{¶ 4} Appellant presents two assignments of error for our review:

I. The Erie County Municipal Court erred in its ruling that it lacks jurisdiction to grant defendant an Administrative License Suspension hearing based on its finding that all charges, including the misdemeanor OVI charges, were bound over to the Grand Jury.

II. The trial court violated the 14th Amendment due process clause to the U.S. Constitution in refusing to afford appellant an Administrative License Suspension hearing.

{¶ 5} Appellant's assignments of error are related and will be jointly addressed.

Appellant argues that the trial court erroneously stated that it was without jurisdiction to conduct an ALS hearing. We initially note that the issue of a trial court's jurisdiction is a question of law and will be reviewed de novo. *See Burns v. Daily*, 114 Ohio App.3d 693, 701, 683 N.E.2d 1164 (11th Dist.1996).

{¶ 6} It is undisputed that the licensed operation of a motor vehicle is a privilege, not a right. *Westlake v. Pesta*, 8th Dist. No. 92150, 2009-Ohio-4713, ¶ 2, citing *Maumee v. Gabriel*, 35 Ohio St.3d 60, 63, 518 N.E.2d 558 (1988). As part of this privilege, in Ohio if a motorist, stopped for a suspected OVI refuses to submit to a chemical test after the proper statutory notifications, the arresting officer is required to:

On behalf of the registrar of motor vehicles, notify the person that, independent of any penalties or sanctions imposed upon the person, the person's Ohio driver's or commercial driver's license or permit or nonresident operating privilege is suspended immediately, that the suspension will last at least until the person's initial appearance on the charge, which will be held within five days after the date of the person's arrest or the issuance of a citation to the person, and that the person may appeal the suspension at the initial appearance or during the period of time ending thirty days after that initial appearance; * * *. R.C. 4511.191(D)(1)(a). See R.C. 4511.197(A).

{¶ 7} As to the appeal of an ALS, R.C. 4511.197 states, in relevant part:

(B) A person shall file an appeal under division (A) of this section in the municipal court, county court, juvenile court, mayor's court, or court of common pleas that has jurisdiction over the charge in relation to which the person was arrested.

* * *.

(D) A person who appeals a suspension under division (A) of this section has the burden of proving, by a preponderance of the evidence, that one or more of the conditions specified in division (C) of this section has not been met. If, during the appeal, the judge or magistrate of the court or the mayor of the mayor's court determines that all of those conditions have been met, the judge, magistrate, or mayor shall uphold the suspension, continue the suspension, and notify the registrar of motor vehicles of the decision on a form approved by the registrar.

Except as otherwise provided in this section, if a suspension imposed under section 4511.191 of the Revised Code is upheld on appeal or if the subject person does not appeal the suspension under division (A) of this section, the suspension shall continue until the complaint alleging the violation for which the person was arrested and in relation to which the suspension was imposed is adjudicated on the merits or terminated pursuant to law. If the suspension was imposed under division (B)(1) of section

4511.191 of the Revised Code and it is continued under this section, any subsequent finding that the person is not guilty of the charge that resulted in the person being requested to take the chemical test or tests under division (A) of section 4511.191 of the Revised Code does not terminate or otherwise affect the suspension. * * *.

{¶ 8} Appellant argues that due to the bind over for grand jury proceedings, the ALS proceeding were caught in “limbo” with no court to exercise jurisdiction. Contrary to appellant’s assertion, the fact that appellant’s OVI case was bound over to the Erie County Grand Jury should have had no effect on the ALS proceedings. An ALS is a civil proceeding separate from any criminal offense. *Westlake v. Pesta, supra*, at ¶ 9. R.C. 4510.73 provides that a court that has invoked jurisdiction in a license suspension matter retains concurrent jurisdiction to adjudicate all issues and appeals regarding the matter. Such suspension includes those imposed by the bureau of motor vehicles. *See Salyer v. Newman*, 4th Dist. No. 11CA4, 2011-Ohio-6676, ¶ 15-18.

{¶ 9} More importantly, as set forth above, a defendant has 30 days to appeal the ALS following his or her initial appearance. *See Pesta, supra*, at ¶ 6; *State v. Derov*, 7th Dist. No. 08 MA 189, 2009-Ohio-4810. The record is devoid of evidence that appellant attempted to appeal the ALS prior to the matter being bound over to the general division. Once the matter was transferred, though the procedure is not clear, appellant, during the balance of the 30-day appeal period, could have appealed the ALS in municipal court. Moreover, even assuming that the court could and had properly transferred jurisdiction of

the suspension matter to the general division, appellant failed to file a timely appeal of the suspension in either court. Appellant's first and second assignments of error are not well-taken.

{¶ 10} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Erie County Municipal Court is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Arlene Singer, P.J.
CONCUR.

JUDGE

JUDGE

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
