2011 WL 10844276
Only the Westlaw citation is currently available.

Commonwealth Court of **Pennsylvania**.

Carlton **CUMMINGS**
v.
COMMONWEALTH of **Pennsylvania**, DEPARTMENT OF **TRANSPORTATION**, **BUREAU** OF **DRIVER LICENSING**, Appellant.

No. 829 C.D.2010. | Submitted Dec. 17, 2010. | Decided Jan. 7, **2011**.

BEFORE: COHN JUBELIRER, Judge, LEAVITT, Judge and BUTLER, Judge.

MEMORANDUM OPINION

BUTLER, Judge.

***1** The Department of **Transportation**, **Bureau** of **Driver** **Licensing** (PennDOT) appeals from the April 21, 2010 order of the Court of Common Pleas of Delaware County (trial court) sustaining the appeal of Carlton **Cummings**' (Licensee) commercial **driver's** **license** (CDL) suspension. The issue before this Court is whether the trial court erred as a matter of law when it sustained Licensee's appeal thereby allowing Licensee to "mask" his Driving Under the Influence (DUI) offense in violation of federal and state law. For the reasons that follow, we affirm the order of the trial court.

On June 22, 2007, Licensee was charged with DUI and, on June 26, 2009 was accepted into the Accelerated Rehabilitative Disposition (ARD) Program. On August 17, 2009, PennDOT sent Licensee notification that his CDL driving privileges were suspended for one year, effective September 21, 2009, as a result of his DUI pursuant to Section 1611(a)(1) of the Vehicle Code. [1]

On September 16, 2009, Licensee filed an appeal from the suspension of his CDL driving privileges claiming that he filed a motion to voluntarily remove himself from the ARD Program and to re-list his DUI charges for trial. On October 15, 2009, Licensee's motion to voluntarily remove himself from the ARD Program was granted, and his case was scheduled for a hearing before the Municipal Court of Philadelphia (municipal court) on December 3, 2009.

The trial court held a hearing on November 17, 2009 on the suspension of Licensee's CDL driving privileges. On April 20, 2010, the trial court sustained Licensee's appeal pursuant to this Court's decision in *Poborski v. Department of **Transportation**, **Bureau** of **Driver** **Licensing***, 964 A.2d 66 (Pa.Cmwlth.2009). PennDOT appealed to this Court. [2]

PennDOT argues that 49 U.S.C. § 31311 (Section 31311) and Sections 1603 and 1611(a)(1) of the Vehicle Code [3] require PennDOT to impose a one-year suspension upon the commercial driving privileges of a CDL licensee who *accepts* ARD for a DUI violation. PennDOT contends that allowing a CDL licensee to escape suspension by voluntarily removing himself from ARD violates the "anti-masking" provisions of Section 31311, and that the **Pennsylvania** legislature intended to comply with the federal law by defining "conviction" as, *inter alia*, acceptance into an ARD program or other preadjudication disposition for an offense. We disagree.

Section 1611 of the Vehicle Code provides:

> Upon receipt of a report of conviction, the department shall, in addition to any other penalties imposed under this title, disqualify any person from driving a commercial motor vehicle or school vehicle for a period of one year for the first violation of:
>
> (1) section 3802 (relating to driving under influence of alcohol or controlled substance) ... where the person was a commercial driver at the time the violation occurred....

Section 1603 of the Vehicle Code provides: "For the purposes of this chapter, a conviction includes ... the acceptance of Accelerated Rehabilitative Disposition or other preadjudication disposition for an offense...." This Court has clearly held in both *Poborski* and *Kolva v. Department of **Transportation**, **Bureau** of **Driver** **Licensing***, 977 A.2d 1248 (Pa.Cmwlth.2009), that "when the trial court grants a petition to withdraw from ARD that decision constitutes a nullification of the licensee's knowing waiver of the right

to challenge the underlying charge and by extension a nullification of his acceptance of ARD." *Kolva*, 977 A.2d at 1253. Licensee was granted a voluntary withdrawal from an ARD program, therefore his previous acceptance into that program was nullified.

***2** PennDOT's contention that nullification of the acceptance into an ARD program through voluntary withdrawal is an attempt to "mask" his DUI conviction is without merit in the present case. Section 31311(a)(19) provides:

> The State shall—
>
> (A) record in the driving record of an individual who has a commercial **driver's license** issued by the State; and
>
> (B) make available to all authorized persons and governmental entities having access to such record,
>
> all information the State receives under paragraph (9) [(relating to individuals with a CDL who violate state or local motor vehicle traffic control laws)] with respect to the individual and every violation by the individual involving a motor vehicle (including a commercial motor vehicle) of a State or local law on traffic control (except a parking violation), not later than 10 days after the date of receipt of such information or the date of such violation, as the case may be. The State may not allow information regarding such violations to be withheld or masked in any way from the record of an individual possessing a commercial **driver's license**.

Further, the "anti-masking" provision of the Code of Federal Regulations (CFR), cited by PennDOT, provides:

> The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CDL driver's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (except a parking violation) from appearing on the [Commercial **Driver's License** Information System] driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.

49 C.F.R. § 384.226.

Licensee's request to withdraw his acceptance into the ARD program would not permanently prevent the DUI conviction from appearing on his CDL driver record. His charges have been re-listed for trial, and may ultimately result in a conviction or an acquittal. Therefore, he is in the same position in which he would have been had he never agreed to enter into the ARD program in the first place. Accepting PennDOT's rationale would mean that anyone who challenges a DUI charge instead of opting for ARD would be "masking" a conviction, which is clearly not the case. Since the trial court's determination does not allow Licensee to "mask" his conviction, it did not err when it sustained Licensee's appeal.

For the reasons stated above, we affirm the order of the trial court.

ORDER

AND NOW, this 7th day of January, **2011**, the April 21, 2010 order of the Court of Common Pleas of Delaware County is affirmed.

Footnotes

1 75 Pa.C.S. § 1611(a)(1).

2 "The Court's review is limited to determining whether the trial court's findings of fact are supported by competent evidence, whether errors of law have been committed or whether there was a manifest abuse of discretion by the trial court." *Kolva v. Dep't of Transp., **Bureau** of **Driver** **Licensing***, 977 A.2d 1248, 1250 n. 2 (Pa.Cmwlth.2009).

3 75 Pa.C.S. § 1603.