

76 Mass.App.Ct. 1130
 Unpublished Disposition
 NOTICE: THIS IS AN UNPUBLISHED OPINION.
 Appeals Court of Massachusetts.

COMMONWEALTH

v.

Steven EBRECHT.

No. 09-P-734. | May 10, 2010.

West KeySummary

1 Automobiles

 Intoxication and implied consent in general

Automobiles

 Repeated or out-of-state misconduct; point system

Factual basis supported trial court's conclusion that the state had established by a preponderance of the evidence that restoration of a driver's license would likely endanger public safety, even though he had been acquitted by a jury on charge of operating under the influence of intoxicating liquor (OUI). Trial court relied on and assessed the testimony from the driver's criminal OUI trial and the driver's driving record. Trial court was satisfied that driver operated his vehicle under the influence of intoxicating liquor. Trial court noted that driver had three prior convictions of OUI, one of which included a speeding violation, and two motor vehicle accidents.

[Cases that cite this headnote](#)

By the Court (GRASSO, GRAHAM & WOLOHOJIAN, JJ.).

**MEMORANDUM AND ORDER
 PURSUANT TO RULE 1:28**

*1 Before us is an appeal from an order of a Superior Court judge denying Steven Ebrecht's motion to restore his driver's license pursuant to G.L. c. 90, § 24(1)(f) (1). For the reasons that follow, we affirm the order.

1. *Background.* On November 4, 2007, Ebrecht was arrested and charged with operating under the influence of intoxicating liquor (OUI). When Ebrecht refused to submit to a breathalyzer, his driver's license was suspended for life on account of the number of his prior convictions of OUI.¹

After a jury found Ebrecht not guilty of OUI,² he moved for restoration of his license. Pursuant to G.L. c. 90, § 24(1)(f) (1), the judge who presided over Ebrecht's criminal trial held a hearing on his motion for restoration of his license and issued findings of fact, rulings of law, and an order denying the motion. This appeal followed.

2. *Judicial review.* In *Commonwealth v. Bauer*, 455 Mass. 497, 499–500, 918 N.E.2d 60 (2009), the Supreme Judicial Court addressed the appropriate avenue of judicial review of an adverse license restoration decision and concluded that “[i]n the future, litigants may obtain review of § 24(1)(f) (1) license restoration orders ... by means of a certiorari action....”³ While *Bauer* now makes clear that certiorari, not direct appeal, is the appropriate avenue of judicial review, we address Ebrecht's challenge directly because his appeal was entered and fully briefed prior to the decision in *Bauer*. We agree with Ebrecht that requiring him to begin anew by a petition for certiorari would be unfair and would cause him the kind of delay and prejudice that the Supreme Judicial Court sought to avoid by limiting application of its ruling to “future cases.”⁴

3. *The merits.* Ebrecht argues that the judge erred because (a) the Commonwealth failed to rebut the statutory presumption that his license should be restored by a preponderance of the evidence; (b) the judge erroneously relied on trial testimony in reaching her conclusions; and (c) introduction of his driving record violated his right to confrontation under the Sixth Amendment to the United States Constitution. See *Melendez-Diaz v. Massachusetts*, — U.S. —, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). We discern no error.

In considering whether the Commonwealth rebutted the statutory presumption and established by a fair preponderance of the evidence that restoration of Ebrecht's license would likely endanger the public safety, the judge relied on and assessed the trial testimony and Ebrecht's driving record. Employing a less rigorous burden of proof than governed Ebrecht's criminal trial, the judge was satisfied that Ebrecht operated his vehicle under the influence of intoxicating liquor

on November 4, 2007. The judge also took note that Ebrecht had three prior convictions of OUI,⁵ albeit of some date, and that his more recent driving record included a speeding violation and two motor vehicle accidents. With such factual basis, the judge could permissibly conclude, as she did, that the Commonwealth had established by a preponderance of the evidence that restoration of Ebrecht's license would likely endanger public safety.

*2 The judge did not err in relying upon the testimony adduced at Ebrecht's criminal trial. Although generally connected to an underlying criminal proceeding, a license restoration hearing is not a criminal trial, or even a civil one. Rather, it is a nonpunitive regulatory matter. See *Luk v. Commonwealth*, 421 Mass. 415, 421 n. 11, 658 N.E.2d 664 (1995); *Commonwealth v. Bauer*, 455 Mass. at 499, 918 N.E.2d 60. While the statute is silent as to the evidence that may be considered, its provision for an immediate hearing before the judge who presided over the criminal trial is a clear indication of the Legislature's intent that the trial judge should consider and assess the trial testimony and evidence in deciding whether the statutory presumption is rebutted and restoration of the defendant's license would likely endanger public safety. Indeed, Ebrecht's counsel expressly urged the judge to consider the trial testimony that favored him in rendering a decision.

Moreover, the judge did not place any limitation on the introduction of other relevant testimony or evidence.

Footnotes

- 1 Ebrecht's license was suspended for life because he had three previous OUI convictions. 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).
- 2 Because of Ebrecht's three prior convictions, the indictment charged him with a subsequent offense.
- 3 For orders entered in the District Court, certiorari is to the Superior Court; for order entered in the Superior Court, as Ebrecht's, certiorari is to the single justice of the Supreme Judicial Court. See *id.* at 500 & n. 5, 841 N.E.2d 1240.
- 4 We note that the point is not jurisdictional. See *Bauer*, *supra* at 499, 918 N.E.2d 60 (rejecting the Commonwealth's argument that the court lacked jurisdiction).
- 5 In connection with at least one of these prior convictions, Ebrecht refused to submit to a breathalyzer test.

Ebrecht's counsel was free to call witnesses, including Ebrecht himself, and to introduce other evidence relevant to whether restoration of Ebrecht's license would likely endanger public safety. The procedure afforded to Ebrecht was fundamentally fair and afforded him due process of law. See *Commonwealth v. Ly*, 450 Mass. 16, 22, 875 N.E.2d 840 (2007).

We have considered and reject the contention that introduction of Ebrecht's driving record violated his Sixth Amendment right to confront and cross-examine witnesses. Because a license restoration proceeding is civil in nature, Sixth Amendment protections are inapplicable. See *Duttons v. Evans*, 400 U.S. 74, 97, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); *Luk v. Commonwealth*, *supra* at 427, 658 N.E.2d 664; *Commonwealth v. Wilcox*, 446 Mass. 61, 67-68, 841 N.E.2d 1240 (2006) (Sixth Amendment by its terms applies solely to criminal prosecutions).

The order denying Ebrecht's motion for restoration of his driver's license is affirmed.

So ordered.

Parallel Citations

925 N.E.2d 866 (Table), 2010 WL 1838950 (Mass.App.Ct.)