

[Cite as *State v. Katz*, 2009-Ohio-5803.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DEAN KATZ

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 09CAC030028

OPINION

CHARACTER OF PROCEEDING:

Appeal from Municipal Court, Case No.
08TRC008896

JUDGMENT:

Reversed & Judgment Entered

DATE OF JUDGMENT ENTRY:

October 23, 2009

APPEARANCES:

For Plaintiff-Appellee

JOSEPH E. SCHMANSKY
70 North Union Street
Delaware, OH 43015

For Defendant-Appellant

JON J. SAIA
ERIC R. ZEISLER
713 South Front Street
Columbus, OH 43206

Farmer, P.J.

{¶1} On July 18, 2008, appellant, Dean Katz, was arrested for OMVI in violation of R.C. 4511.19 and various other misdemeanor traffic offenses. At the time of his arrest, appellant refused to take the breathalyzer test. As a result, appellant lost his driver's license under an administrative license suspension (hereinafter "ALS") pursuant to R.C. 4511.191(B).

{¶2} On July 25, 2008, appellant filed an appeal of his ALS pursuant to R.C. 4511.197.

{¶3} A jury trial commenced on September 23, 2008. The jury found appellant not guilty on all charges except for two misdemeanor offenses.

{¶4} On December 1, 2008, appellant filed a motion to terminate his ALS. By judgment entry filed February 10, 2009, the trial court denied the motion and reinstated the ALS.

{¶5} On February 24, 2009, appellant again moved to terminate his ALS. By judgment entry filed March 2, 2009, the trial court again denied the motion.

{¶6} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶7} "THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT'S MOTION TO TERMINATE THE ADMINISTRATIVE LICENSE SUSPENSION."

I

{¶8} Appellant claims the trial court erred in denying his motion to terminate his ALS. We agree.

{¶9} A review of the record sets forth the following dates, as they apply to the appeal of the ALS:

{¶10} 1. On July 25, 2008, appellant filed a written appeal of his ALS.

{¶11} 2. On July 31, 2008, the trial court filed a notice wherein a "Pre-Trial/ALS Appeal" was scheduled for August 25, 2008.

{¶12} 3. On August 25, 2008, the trial court filed a "Pre-trial Conference Memorandum" which did not mention the ALS appeal.

{¶13} 4. On August 29, 2008, the trial court filed a notice, scheduling a final pre-trial for September 22, 2008 and a jury trial for September 23, 2008.

{¶14} 5. There is nothing in the record regarding the September 22, 2008 final pre-trial.

{¶15} 6. A jury trial commenced on September 23, 2008 and the jury found appellant not guilty of all the charges except for two misdemeanor offenses.

{¶16} 7. On December 1, 2008, appellant filed a motion to terminate his ALS and reinstatement fee. The motion prayed for termination because the trial court failed to afford appellant a hearing on his ALS appeal.

{¶17} 8. On January 9, 2009, the trial court filed a judgment entry scheduling a hearing on the motion for February 4, 2009. Appellant waived argument.

{¶18} 9. By judgment entry filed February 10, 2009, the trial court denied appellant's motion, stating the following:

{¶19} "Motion **DENIED**. The reason the Motion was denied is:

{¶20} "Defendant waived oral hearings set on the ALS appeal on August 25, 2008 and February 4, 2009. Defendant failed to meet his burden of proof. The ALS is reinstated and the driving privileges are reinstated."

{¶21} In support of his position, appellant cites this court to opinions from this district, *State v. Wellman*, Licking App. No. 2006CA00091, 2007-Ohio-6107, and *State v. Norman*, Knox App. No. 2005CA00022, 2005-Ohio-5791. We find the *Norman* case, wherein this court reversed the trial court's decision and remanded the matter to the trial court for an evidentiary hearing, to be relevant to this case:

{¶22} "We have read R.C. 4511.197, and find the statute does not expressly set forth the procedure a trial court is to follow in reviewing an appeal of an administrative license suspension. The statute clearly provides for an appeal as a means to seek relief from an administrative license suspension. We find inherent in an ALS appeal is an opportunity for an individual to be heard. The statute expressly places the burden of proof of a preponderance of the evidence on the person appealing the ALS. Here the appellant was denied both. The State failed to file a brief with this court. As such, we have not been directed to any case law which would conclude the contrary." *Norman* at ¶17.

{¶23} As we stated in *Norman*, "the statute does not expressly set forth the procedure a trial court is to follow in reviewing an appeal of an administrative license suspension." However, the individual appealing the ALS has the burden of proving that the specified conditions of R.C. 4511.197(C) have not been met:

{¶24} "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." R.C. 4511.197(D).

{¶25} Implicit in the statute is the right to an evidentiary hearing. The state claims appellant has been afforded two hearings, one on August 25, 2008 and another on February 4, 2009. We disagree with the state's interpretation of the trial court's docket. The February 4, 2009 hearing, wherein appellant waived argument, was on the failure to grant him a hearing as requested in his December 1, 2008 appeal. The trial court set a hearing on appellant's ALS appeal only once, and that was for August 25, 2008. The record does not indicate any evidentiary hearing and/or disposition of the ALS appeal on August 25, 2008.

{¶26} We concur with appellant's position that the lack of any mention or order relative to the ALS appeal is tantamount to a denial of appellant's right to a hearing pursuant to R.C. 4511.197.

{¶27} The sole assignment of error is granted. The denial of the ALS appeal is reversed, and the ALS is terminated.

{¶28} The judgment of the Municipal Court of Delaware County, Ohio is hereby reversed.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES

SGF/sg 925

