SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

847

TP 23-00737

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, AND GREENWOOD, JJ.

IN THE MATTER OF CHRISTOPHER KROLL, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT.

DIPASQUALE & CARNEY, BUFFALO (JASON R. DIPASQUALE OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DOUGLAS E. WAGNER OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Henry J. Nowak, J.], entered April 18, 2023) to review a determination of respondent. The determination revoked petitioner's driver's license.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination revoking his driver's license based on his refusal to submit to a chemical test following his arrest for driving while intoxicated (DWI). We confirm the determination. Contrary to petitioner's contention, the determination that petitioner twice refused to submit to a chemical test after receiving the requisite warnings is supported by substantial evidence (*see Matter of Malvestuto v Schroeder*, 207 AD3d 1245, 1245-1246 [4th Dept 2022]). The arresting officer's testimony at the hearing, along with his refusal report, which was entered in evidence, established that petitioner refused to submit to a chemical test after he was arrested for DWI and provided with two clear and unequivocal warnings of the consequences of such refusal (*see id.* at 1246; *see generally* Vehicle and Traffic Law § 1194 [2] [b]).

We reject petitioner's contention that his level of incapacitation, which prompted the arresting officer to admit him to a treatment center for emergency services pursuant to Mental Hygiene Law § 22.09 (b) (2), rendered him incapable of providing a chemical test refusal. "Vehicle and Traffic Law § 1194 (2) does not require a knowing refusal by the petitioner" (*Matter of Hickey v New York State Dept. of Motor Vehs.*, 142 AD3d 668, 669 [2d Dept 2016]). Further,

"the Legislature, concerned with avoiding potentially violent conflicts between the police and drivers arrested for intoxication, . . . provide[d] that the police must request the driver's consent [for a chemical test], advise [them] of the consequences of refusal and honor [their] wishes if [they] decide[ ] to refuse, but . . . dispense[d] with [those] requirements when the driver is unconscious or *otherwise incapacitated to the point where [they] pose[ ] no threat*" (*People v Kates*, 53 NY2d 591, 596 [1981] [emphasis added]). Here, inasmuch as the arresting officer deemed petitioner in need of emergency services due to the "likelihood [of] . . . harm to [himself] or to others" (Mental Hygiene Law § 22.09 [b] [2]), it cannot be said that petitioner posed no threat at the time the chemical tests were requested and the refusal warnings were issued. Moreover, petitioner's interpretation of the statute "would lead to the absurd result that the greater the degree of intoxication of an automobile driver, the less the degree of [the driver's] accountability" (*Matter of Carey v Melton*, 64 AD2d 983, 983 [2d Dept 1978]; *see Kates*, 53 NY2d at 596; *Hickey*, 142 AD3d at 669).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court