IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
vs.	**:**	**No. CR-1199-2017**
	:	
KENNETH LITTLEJOHN,	**:**	**Opinion and Order Re**
Defendant	**:**	**Defendant's Motion to Suppress**

OPINION AND ORDER

Drunk drivers inflict immeasurable harms to persons and property. To combat these harms and to deter drunk driving, the Commonwealth of Pennsylvania enacted Driving Under the Influence (DUI) laws not only criminalizing such behaviors on an escalating basis but also imposing civil sanctions including but not limited to, loss of driving privileges.

Pennsylvania's DUI laws not only penalize repeat offenders but those who drive or operate a vehicle with higher blood alcohol levels. For years, the DUI enforcement landscape has compelled drivers to submit to blood alcohol testing or face not only substantial criminal penalties but substantial civil consequences.

That landscape significantly changed on June 23, 2016 when the United Supreme Court issued its Opinion in ***Birchfield v. North Dakota***, 136 S. Ct. 2160 (2016). Contrary to then existing Pennsylvania law, the Supreme Court held that a motorist could not be criminally punished for refusing to submit to a blood test based on implied consent to submit to such. The Supreme Court concluded that while implied consent laws may provide a basis to impose civil penalties and evidentiary consequences on motorists who refuse to comply with the request to give blood, the Commonwealth could not insist upon the blood test and then impose criminal penalties on a refusal to submit. "There must be a limit to the

consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." ***Birchfield,*** 136 S.Ct. at 2185.

In ***Commonwealth v. Giron***, 155 A.3d 635 (Pa. Super. 2017), the Superior Court noted that ***Birchfield*** concluded that states could not impose criminal penalties upon individuals who refuse to submit to a warrantless blood test because such penalties violate an individual's Fourth Amendment (as incorporated into the Fourteenth Amendment) right to be free from unreasonable searches and seizures. *See* ***id.*** at 639. Further, the Superior Court held that, in the absence of a warrant or exigent circumstances justifying a search, a defendant who refuses to provide a blood sample when requested by police is not subject to the enhanced penalties provided under Pennsylvania law,75 Pa. C.S. §§ 3803-3804. ***Id.*** at 640.

One of the well-established exceptions to a warrantless search is the consent exception. ***Commonwealth v. Evans***, 153 A.3d 323 (Pa. Super. 2016).

"It is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be expressed but may be fairly inferred from context." ***Commonwealth v. Bell***, 2017 Pa. Super. LEXIS 545, *12 (quoting ***Birchfield***, supra. at 2185).

"In determining the validity of a given consent, the Commonwealth bears the burden of establishing that consent is a product of an essentially free and unconstrained choice – not the result of duress or coercion, express or implied, or a will overborn – under the totality of the circumstances." ***Commonwealth v. Evans***, 153 A.3d 323, 328 (2016)(quoting ***Commonwealth v. Smith***, 77 A.3d 562, 573 (Pa. 2013)).

> The standard for measuring the scope of a person's consent is based on an objective evaluation of what a reasonable person would have understood by the exchange between the officer and the person who gave the consent. Such evaluation includes an objective examination of the maturity, sophistication and mental or emotional state of the defendant. Gaging the scope of a defendant's consent is an inherent and necessary part of the process determining, on the totality of the circumstances presented, whether the consent is objectively valid, or instead the product of coercion, deceit or misrepresentation.

Id.

Since ***Birchfield***, the courts have had an opportunity to address consent in the context of giving a blood sample. In ***Evans***, supra., the Superior Court noted that the defendant consented to the warrantless blood draw after the police informed him that refusal to submit to the test could result in enhanced criminal penalties. The Court reasoned that, since ***Birchfield*** held that a state could not impose criminal penalties on the refusal, the police officer's advisory to the defendant was partially inaccurate. The trial court's decision was vacated and the case was remanded to the trial court to "re-evaluate defendant's consent based on the totality of all of the circumstances and given the partial inaccuracy of the officer's advisory." ***Evans***, 153 A.3d at 331 (citing ***Birchfield***, supra. at 2186).

In ***Commonwealth v. Haines***, 2017 Pa. Super. LEXIS 585 (August 2, 2017), the Superior Court remanded the case to the trial court to determine whether Haines' consent was tainted by the warnings given by Sergeant Dehoff that included the increased criminal penalties. The court noted that Sgt. Dehoff told Haines that due to the nature of the crash he was going to ask him to take a blood test to determine how much alcohol was in his blood. Haines said, "Okay." The officer then read Haines the warnings that included the increased criminal penalties and asked Haines to submit to a blood test. Haines agreed to take the test.

The Superior Court stated:

> We agree that **if** Haines validly consented **before** being informed that he faced enhanced criminal penalties for failure to do so, then his consent would not be tainted by the warning and the results of the blood test would be admissible. *See* ***Birchfield***, 136 S.Ct. at 2185-86. If, however, he did not consent until after Sergeant Dehoff informed him that he would face enhanced penalties if he refused to consent, then the trial court did not necessarily err in granting his motion to suppress the test results. ***Id***.

Id. at *10

In addressing defendant's arguments in the case sub judice, it is evident to this court that the defendant argues in absolutes. First, the defendant argues that the standard for consent must be knowing, intelligent and voluntary. Second, the defendant argues that confusion and coercion are necessarily intertwined with every consent. More specifically, the defendant argues that one is presumed to know the law; accordingly, one is presumed to know that there are enhanced penalties under Pennsylvania's existing statute. Those penalties include criminal penalties. Next, the defendant argues that the present informed consent forms read by law enforcement do not inform defendants of the criminal penalties and, accordingly, constitute a mistake of law. The defendant also argues that he has a constitutional right to request a warrant and the fact that a law enforcement officer did not inform him of this right constitutes deliberate misinformation. Similarly, the defendant argues that the present state of the law causes a motorist confusion and he must be informed that, despite the enhanced penalties essentially "on the books," they will not be applied.

Any analysis of defendant's claim must first start with the nature of the right being given up and the standard required to waive that right.

Contrary to what defendant claims, the law is clear that one does not have constitutional right to refuse a blood test. In ***Bell***, supra., the Superior Court concluded that ***Birchfield*** does not provide that an individual has a constitutional right to refuse a warrantless blood test. ***Bell***, supra. at *9 (citing ***Commonwealth v. Graham***, 703 A.2d 510 (Pa. Super. 1997)). As the court in ***Bell*** explained, the right to refuse a blood test is not one of a constitutional dimension but rather is simply a matter of grace bestowed by the legislature. ***Id.*** (citing ***South Dakota v. Neville***, 459 U.S. 553, 565, 103 S.Ct. 916 (1983).

While a warrantless blood test is per se unreasonable, one of the exceptions to the warrant requirement is consent. In determining the validity of a given consent, the Commonwealth bears the burden of establishing that it is the product of an essentially free and unconstrained choice and not the result of duress or coercion express or implied, or a will overborn under the totality of the circumstances. The standard for measuring the scope of a person's consent is based on an objective evaluation of what a reasonable person would have understood by the exchange between the officer and the person who gave the consent. ***Evans***, supra. at 327.

Contrary to Defendant's assertions, his consent need not be knowing and intelligent. See ***Schneckloth v. Bustamonte***, 412 U.S. 218, 236-246 (1973); ***Commonwealth v. Cleckley***, 738 A.2d 427 (Pa. 1999)(rejecting the argument that, under Article I, §8 of the Pennsylvania Constitution, the test of 'voluntariness' should include as well a finding that the subject of the search knowingly and intelligently waived his or her right to refuse to consent, and finding that the greater privacy rights of the Pennsylvania Constitution are

sufficiently protected where the federal standard of voluntariness has been met.).

In ***Commonwealth v. Cleckley***, 738 A.2d 427 (Pa. 1998), the court was confronted with the issue of whether a consensual search could be deemed valid where the person subject to the search did not know he had the right to refuse such consent. The court concisely set forth the standard for consent as "voluntary." The court denied the argument that the test for voluntariness should include a knowing and/or intelligent waiver. The court noted that a traditional waiver analysis, while appropriate for preserving those constitutional rights guaranteed a criminal defendant in order to assure a fair trial, was not encompassed in the Fourth Amendment. The court further noted that Article I ,Section 8 of the Pennsylvania Constitution provides an individual no greater protection than the Fourth Amendment with regard to a search. The court declined to extend the privacy rights obtained under Article I, Section 8. The court did concede that while one's knowledge of his or her right to refuse remained a factor in considering the validity of consent, it "simply is not a determinative factor."

The Supreme Court has continued to utilize the "voluntariness" standard in addressing consent issues. See ***Commonwealth v. Smith***, 621 Pa. 218, 77 A.3d 562 (2013); ***Commonwealth Xander***, 14 A.3d 174 (Pa. Super. 2011).

As indicated earlier, in ***Commonwealth v. Evans***, 153 A.3d 323 (Pa. Super. 2016), the Superior Court most recently addressed the issue of consent in a blood draw scenario. The warrantless blood draw was justified solely because the defendant consented to such. The reasonableness of the search hinged upon whether the defendant's consent was

voluntary. The defendant consented to the warrantless blood draw after the police informed him that if he refused and he was convicted of an incapable offense, he would be subject to more severe penalties. In light of ***Birchfield***, this was not the law and the defendant's consent was based on "partially inaccurate" advice. Accordingly, the judgment of sentence was vacated.

Despite defendant's arguments to the contrary, his absolutes fail to convince this court that the consent given in this case was not voluntary.

Much of defendant's argument relies on the premise that "everyone is presumed to know the law." Motion to Suppress, paragraph 33. Defendant cites ***In Re: Kearney***, 136 Pa. Super. 78, 7 A.2d 159 (1989). Defendant argues that motorists know the law regarding refusal and accordingly when they are not told of said law, they become confused and cannot possibly give a voluntary consent.

Indeed, defendant attempts to bolster this argument by citing the recent Supreme Court plurality decision in ***Commonwealth v. Myers***, 2017 Pa. LEXIS 1689 (July 19, 2017). To the contrary, this court deems the ***Myers*** decision to support this court's conclusions.

First, it confirms that one's right to refuse is not a constitutional right but a statutory right. ***Myers***, supra. at *33(under 75 Pa.C.S. §1547(b)(1) there is an absolute right to refuse). Second, it again confirmed the ***Birchfield*** holding, determining that a warrantless blood draw cannot be justified by implied consent whether the refusal to submit to the test subjects an individual to criminal penalties. ***Myers***, supra. at 9. It reiterates the primary

concern in ***Birchfield*** that the consent to a search could not be coerced by the threat of criminal penalties. ***Myers***, supra. at 9.

Further, the court noted that based on prior decisions, there was not a right to consult with an attorney before making a decision but that the arrestee must be advised of the consequences of the refusal. ***Myers***, supra. at 14.

It further confirmed that when a search is premised on consent, "the Fourth and 14th amendments require the government to demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." ***Myers***, supra. at 18 citing ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219, 248 (1973).

"The opportunity to make a knowing and conscious choice – to decide whether to provide actual, voluntary consent or to exercise the right of refusal-is essential in every situation in which police officers seek to rely upon the implied consent law instead of upon a search warrant." ***Myers*** at 25. "This conclusion not only is commanded by the statute; it is a constitutional necessity." ***Myers***, at 25.

In the case at issue, this court concludes that under all of the circumstances, the defendant's consent was voluntary. While the court accepts that, a defendant is presumed to know the law, defendant has not cited nor has this court found any authority that limits one's knowledge to only statutory provisions. This court, in fact, holds that defendant is presumed to know all of the laws governing driving under the influence. This court concludes that motorists are presumed to know that even though the statute says one thing, United States and Pennsylvania Supreme Courts have decided that the statute is

unenforceable and that one who refuses a blood test cannot be punished more harshly because of such refusal.[1]

This court does not sanction a system whereby a police officer would need to comply with the statutory provisions regarding consent and refusal and then inform the motorists that those provisions are no longer enforceable because of recent court decisions. This would in fact create only more confusion to the average motorist.

First, the Pennsylvania Superior Court has held that the police provide partially inaccurate information when they provide a defendant with warnings that include the increased criminal penalties for refusing a blood test. ***Commonwealth v. Evans***, 153 A.3d 323, 331 (Pa. Super. 2016).

Second, the increased penalties are only invalid with respect to blood tests; they are not invalid with respect to breath tests. ***Commonwealth v. Giron***, 155 A.2d 635, 640 n.13 (Pa. Super. 2017)(citing ***Birchfield***, 136 S.Ct. at 2173-2174). Providing the warnings advocated by Defendant would create even more confusion to the average motorist than only advising him or her of the consequences of refusal which remain valid following ***Birchfield***.

This court does not accept defendant's position regarding any of the claimed absolutes. There is no authority to support defendant's conclusion that a motorist must be advised of his constitutional right to request a warrant or of any alleged constitutional right to

[1] The Pennsylvania legislature has now amended the implied consent law and the penalties for DUI to account for the decision in ***Birchfield***. Under the new DUI law, there are increased penalties for the refusal of a breath test under 75 Pa. C. S. §1547 or testing of blood pursuant to a valid search warrant. See 2017 Pa. Laws 30.

refuse to provide a blood test.

The Pennsylvania Supreme Court has eschewed per se rules and has clearly held that no one fact or circumstance can be talismanic in the evaluation of the validity of a person's consent. ***Smith***, 77 A.3d at 572. As a result, the Pennsylvania Supreme Court has rejected arguments in support of per se rules that for consent to be valid an individual must be advised of his or her right to refuse or that the results of the test may be used against them in a criminal prosecution. ***Cleckley***, supra (right to refuse); ***Smith***, supra (results may be used in a criminal prosecution).

In this particular case, following the stop of the vehicle, the officers interacted with the defendant who complied with their directives. The defendant attempted to perform field sobriety tests. He understood what was required of him but explained that he was not able to do so. While attempting to perform the tests, the defendant voluntarily stopped and asked the police officers to "just take me to the hospital to give blood." Based on this evidence, the court finds the defendant voluntarily consented to submit to a blood test before any implied consent warnings were given. Therefore, the blood test results are admissible pursuant to ***Haines***.

Furthermore, the defendant's subsequent consent was not "tainted" in this case, because he was never informed of the enhanced criminal penalties for refusal. The defendant was taken into custody and transported to the DUI Center to give blood. The defendant was read an amended DL-26 B form, given an opportunity to review it and then willingly signed it. There was nothing in the form whatsoever that was confusing. In fact all

of the information set forth in the form was 100 % legally correct.

The challenged evidence was not obtained in violation of the defendant's rights. There was no testimony that the defendant's consent was coerced. Rather, his consent was the product of an essentially free or unconstrained choice. It was not the result of duress or coercion, express or implied.

The exchanges between the officer and the defendant who gave the consent were pleasant, non-threatening, non-coercive and informative. The defendant had the maturity, sophistication and mental state to decide to take the test which he was well aware of even prior to being placed under arrest.

ORDER

AND NOW, this ___ day of September 2017, following a hearing and argument, defendant's motion to suppress is DENIED.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
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Work File