

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**RYAN A. PORTANOVA,
Defendant**

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CR-200-2017

SUPPRESSION

OPINION AND ORDER

On March 10, 2017, the Defendant filed a Motion to Suppress Evidence. A hearing on the motion was held on August 18, 2017. The issue raised by the Defense was that his blood was drawn in violation of his U.S. and Pennsylvania Constitutional rights.

Defendant is charged with Driving Under the Influence of Alcohol¹, an ungraded misdemeanor; Driving Under the Influence with Highest Rate of Alcohol², second offense, a misdemeanor of the first degree; and a summary offense. The charges arise out of an incident that occurred on November 26, 2016, in Lycoming County, Pennsylvania.

Factual Background

Officer Tyler T. Bierly (Bierly) of the Tiadaghton Valley Regional Police Department testified on behalf of the Commonwealth. He has been an officer for 18 months. Bierly received training in both standardized field sobriety and advanced roadside impairment detection (ARIDE).

Bierly testified that he was on routine patrol on November 26, 2016. At 2:14 am, he identified Defendant's vehicle on traveling East on Seminary Street with an

¹ 75 Pa.C.S. § 3802(a)(1).

² 75 Pa.C.S. § 3802(c).

inoperable taillight. Bierly activated his emergency lights making contact with Defendant. He also observed a female passenger as well as a large dog in the vehicle. Bierly testified that Defendant fumbled with paperwork that he was asked to produce but was ultimately able to provide Bierly with the requested documents.

While speaking to Defendant Bierly detected an odor of alcohol coming from vehicle. Bierly described the Defendant's speech as "thick, slurred, and slow, slower than normal." Defendant's eyes were bloodshot and glassy.

Bierly testified that Defendant's attitude was very cooperative. Bierly described the Defendant as "very forthcoming." After retrieving the vehicle documents, Bierly had County run his name and asked Defendant if he had anything to drink. Defendant admitted he had three or four beers. Bierly asked the Defendant to exit his vehicle and go to rear of his vehicle. Defendant stumbled getting out but walked to rear of his vehicle on his own.

During the field sobriety tests, Bierly testified that the Defendant swayed during both the walk and turn and one leg stand. Defendant's performance on the walk and turn test was unsatisfactory. Defendant failed to touch heel to toe, failed to perform a proper turn, and stepped off the imaginary line. The one leg stand was also not performed satisfactorily. However, Defendant responded appropriately to questions posed by Bierly.

Bierly further testified that he has experience dealing with more than 50 individuals in an impaired state. He formed the opinion based on Defendant's admissions, his performance on the field sobriety test as well as other cues as listed above that Defendant was unable to operate a motor vehicle in a safe manner. Bierly

placed the Defendant under arrest and took him into custody. Defendant was handcuffed in the back of the police vehicle on the way to the hospital.

Bierly transported Defendant to the Jersey Shore Hospital for a chemical blood test. Bierly denied making threats towards Defendant and denied coercing Defendant to submit to the blood test. Defendant was taken into the front lobby in an area on the right side where there were no other people and was read the revised DL26B implied consent form. In reviewing the form with the Defendant, Bierly denied raising his voice or drawing his weapon or Taser. Bierly also denied using a physically menacing stance.

Bierly testified that at the hospital Defendant was able to follow directions and did not ask follow up questions. The Defendant did sign the DL26B form, not on the line he was instructed to sign rather where the officer is supposed to sign. Commonwealth's Exhibit 1. Signed DL26B Form, 11/26/2016. Bierly testified that it is not unusual in his 18 months experience for operators to sign the incorrect line.

After the form was signed, Bierly and the Defendant went to the lab and blood was drawn from Defendant. Bierly testified that Defendant was compliant and cooperated the entire time. Bierly testified that he did not tell the Defendant he had to give blood.

After the blood draw, the Defendant was handcuffed and transferred back to the police station and read questions from the DUI packet after he was read Miranda³ warnings. The Defendant then agreed to waive Miranda. Commonwealth Exhibit #2. Miranda Rights Warning, 11/26/2016.

³ Miranda v. Arizona, 384 U.S. 436 (1966).

Discussion

Was Defendant's blood seized from him in violation of his rights under Article 1 Section 8 of the Pennsylvania Constitution and under the Fourth Amendment to the United States Constitution?

Generally, police are required to get a search warrant before conducting a Fourth Amendment search. Exceptions to the requirement that police obtain a warrant before conducting a search include that the individual consents to the search.

In order for consent to a search be valid it need only be voluntary:

[T]he burden of establishing that a consent is the product of an essentially free and unconstrained choice — not the result of duress or coercion, express or implied, or a will overborne — 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. Such evaluation includes an objective examination of the maturity, sophistication and mental or emotional state of the defendant. Gauging the scope of a defendant's consent is an inherent and necessary part of the process of determining, on the totality of the circumstances presented, whether the consent is objectively valid, or instead the product of coercion, deceit, or misrepresentation.

Commonwealth v. Evans, 153 A.3d 323, 328 (citing Commonwealth v. Smith, 77 A.3d 562, 573 (Pa. 2013) (internal citations, quotations, and corrections omitted).

The Court looks to the totality of the circumstances to determine whether Defendant's consent to the blood draw was voluntary. Commonwealth v. Haines, 168 A.3d 231 (Pa. Super. 2017) (case remanded with mandate: "we must remand for a determination as to whether, under the totality of the circumstances, including the issue of timing, Haines' consent to the blood draw was valid.")

A factor for the Court to consider against a determination of voluntariness is the fact that Defendant was under arrest at the time of the blood draw. He was handcuffed and transported to the Jersey Shore Hospital in a police cruiser. His handcuffs were removed during his time in the hospital but replaced after being

returned to the police vehicle, While Defendant was handcuffed he was driven to the police station for further questioning where he was asked to speak with the police without an attorney present. Additionally, Defendant was advised that if he did not consent to the blood draw, that his driver's license would be suspended for at least 12 months, if not more, depending on whether he had other driving under the influence convictions. He was also told that if he remained silent or asked for an attorney that would be deemed to be a refusal.

Defendant was not, however, advised that there would be criminal consequences to his refusal. The Court finds Bierly credible in his statements that Defendant was cooperative during the entirety of their exchange. The Court looks to the executed DL26B Form and the Miranda Waiver form and sees a Defendant that was able to fill out those forms. In total, the Court need only believe that the Defendant was not coerced into consenting to the blood draw and that his submission to them was voluntary. The Court believes that the contents of the revised DL26 form (DL26B) comply with the requirements of Birchfield⁴. Moreover, the Court finds that it is clear from the text of the DL26B Form and the testimony of Bierly that the choice to take the blood test was Defendant's and Defendant's alone. From an objective viewpoint, the Defendant was given an opportunity to decline the test and he did not. He was not told that should he fail to consent that he could be charged with a more serious crime. The Court neither believes that the Defendant was coerced nor a reasonable person in Defendant's position would not have understood that he could

⁴ 136 S. Ct. 2160, 2185 (2016).

decline blood testing and so therefore the Court will not suppress the evidence found as a result of that search.

Was the Defendant so under the influence of alcohol that he could not intelligently determine whether he should consent to the test?

Voluntariness "must be shown by a preponderance of the credible evidence." Commonwealth v. Kuhn, 475 A.2d 103, 105 (Pa. Super. 1984). In order to meet this burden, "the Commonwealth must demonstrate that the proper warnings were given, and that the accused manifested an understanding of these warnings."

Commonwealth v. Eichinger, 915 A.2d 1122, 1136 (Pa. 2007).

The Court finds Bierly credible in his testimony that the Defendant was given the proper warnings as required by law and that the Defendant manifested an understanding of those warnings. The Court read the answers to the interview questions Defendant wrote and finds that the Defendant was not so under the influence of alcohol that he did not understand what was happening to him and could not voluntarily consent to the prior blood draw. He was awake and alert enough to consent to the blood draw and remained so afterwards to fill out the interview form. He was able to follow the directions of Bierly. Though he was under arrest for suspected driving under the influence of alcohol, he appears to have understood what was being requested of him as evidenced by his cooperation. The Court finds that the Defendant knew that he was consenting to the blood draw and that he intended to consent to the blood draw.

Did Bierly's failure to advise Defendant of his constitutional right to counsel or right to remain silent when he was requested to give consent vitiate a knowing intelligent and voluntary waiver of Defendant's constitutional rights?

Defendant's consent to blood draw did not have to be knowing, voluntary, and intelligent. It only needed to be voluntary. Commonwealth v. Gordon, CP-41-CR-0000393-2017, (decision of Court Sep. 27, 2017); Commonwealth v. Wilt, CP-41-CR-0000251-2017, (decision of Court Oct. 18, 2017).

Was Defendant's consent voluntary when he had been told that he his drivers' license would be suspended if he did not consent to the test, and that he had no right to speak to an attorney?

Being told the civil consequences of not consenting to the blood draw and that the Defendant has no right to speak to an attorney does not vitiate voluntary consent as a matter of law. Gordon, *supra*; Wilt, *supra*.

Did Defendant have a constitutional right to refuse testing of the blood unless the police first obtained a search warrant?

The Court does not reach whether Defendant has a constitutional right to refuse as he has a statutory right to refuse. Commonwealth v. Eicher, 235, 249 (Pa. Super. Ct. 1992) (courts should not decide constitutional questions unless absolutely required to do so); Commonwealth v. Myers, 164 A.3d 1162, 1170 (Pa. 2017) (Subsection 1547(b)(1) confers upon all individuals under arrest for DUI an explicit statutory right to refuse chemical testing, the invocation of which triggers specified consequences.)

Miranda warnings were not required at the time of the blood draw as they only attach at the time of custodial interrogation. Also See Gordon, *supra*; Wilt, *supra*.

(explaining the difference between waiving a 4th Amendment versus a 5th Amendment right).

ORDER

AND NOW, this 16th day of November, 2017, based upon the foregoing Opinion, the Defendant's Motion to Suppress is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

cc: Peter T. Campana, Esq.
Scott Werner, Esq.
Gary Weber, Esq.