

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**MARVIN TURNER,
Defendant**

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CR-1482-2017

SUPPRESSION

OPINION AND ORDER

On May 22, 2017, Marvin Turner (Defendant) was arrested for Driving under the Influence of a Controlled Substance¹ and related offenses. Defendant was observed operating his vehicle in an erratic manner by a concerned citizen just west of the Maynard Street on ramp onto Interstate 180 within the City of Williamsport.

Defendant was scheduled for a preliminary hearing on August 22, 2017 which was rescheduled by the Magisterial District Judge Christian Frey to September 5, 2017. At the time set for the hearing, Defendant waived both his preliminary hearing and his Formal Court Arraignment which was scheduled for September 25, 2017. Defendant was given a future guilty plea date on November 3, 2017. At that time Defendant was represented by the Public Defender's Office.

On November 3, 2017, the Defendant filed an Omnibus Pretrial Motion in the form of a Motion to Suppress Evidence by new Defense Counsel². This Court summarily denied the motion as it was filed more than thirty (30) days after

¹ 75 Pa.C.S. § 3802(d)(2).

² Counsel pleads in his Motion to Reconsider that a waiver and entry of appearance was entered by him on behalf of the Defendant on September 25, 2017, however those documents, along with an order granting him leave to enter and the Public Defender's Office leave to withdraw from the case are not found within the Court file.

Defendant's arraignment³. Defense Counsel did not allege any reason which delayed or justified the filing after the thirty (30) day time period.

Defendant filed a Motion to Reconsider this Court's timeliness ruling which was scheduled to be heard on December 18, 2017. In the motion, Defense Counsel alleged that he did not receive discovery until October 26, 2017 and the motion was filed within 8 days of the receipt of the discovery. Due to a scheduling conflict with the Court, the Motion was rescheduled earlier to December 11, 2017. At the hearing, the Commonwealth raised no objection to litigating the Suppression motion, the reconsideration was granted and a suppression hearing was scheduled for March 1, 2018 before this Court.

Defense Counsel raised two issues in his Motion to Suppress. Did the City police have sufficient probable cause to stop the Defendant that evening and was his consent valid for the blood draw. However after the testimony was presented at the hearing, Defense Counsel only advanced the *Birchfield*⁴ issues related to the validity of the Defendant's consent to the blood draw.

Testimony of Officer Andrew Stevens

Officer Andrew Stevens (Stevens) of the Williamsport Bureau of Police testified that he has been employed by the City for three years. He has received training in standard field sobriety testing (SFST), advanced roadside impaired driving

³ Except as otherwise provided in these rules, the omnibus pretrial motion for relief shall be filed and served within 30 days after arraignment, unless opportunity therefor did not exist, or the Defendant or Defense attorney, or the attorney for the Commonwealth, was not aware of the grounds for the motion, or unless the time for filing has been extended by the court for cause shown. **Pa. R. Crim. P. 579.**

⁴ 136 S. Ct. 2160, 2185 (2016).

enforcement (ARIDE), Protecting Lives, Saving Futures⁵ and as a drug recognition expert (DRE). He has had approximately 200 to 300 or more contacts with people suspected of driving under the influence of alcohol or controlled substance.

On May 22, 2017, at about 10:07 PM Stevens was traveling in a marked unit in full uniform with a partner in the area of Maynard Street by the Sheetz convenience store. He would have received a dispatch from County Control regarding a “reckless driver on interstate 180 who was “all over the road.” Stevens was also told by County that the vehicle, a white Pontiac, had exited off the Market Street off-ramp of Interstate 180 traveling south bound toward the Borough of South Williamsport. Based upon the other information provided by County, Stevens and his partner then drove onto the Interstate and parked in the median area of Interstate 180 west just east of the Route 15 split. As the concerned citizen continued following the swerving Pontiac, police were able to verify the vehicle in question. The police followed the vehicle while it exited Interstate 180 on Route 15 northbound; they also observed erratic driving and activated their emergency lights. In response, Defendant pulled the vehicle over in what appeared to be the middle of the entrance ramp onto Route 15 northbound.

When Stevens approached Defendant, he observed him to be droopy eyed and barely able to form complete sentences. Even though the area was dark, he noticed that Defendant had pinpoint pupils. Based upon his training as a DRE he knew that to be a sign the Defendant may have ingested a narcotic analgesic. Defendant appeared to slur and mumble while talking with Stevens; he fumbled while

⁵ A course through the National District Attorney’s Association.

finding his registration and insurance and had to be reminded to provide his drivers license.

Stevens testified that the Defendant denied drinking and that he had just dropped someone off and was on his way to "Philly." Defendant acknowledged that he was currently prescribed Oxycodone, 30 mg, to be taken three times a day and that his last dose was taken at 11:00 AM.

Stevens asked Defendant to perform field sobriety tests to which he agreed. Once the Defendant was outside of his car, Stevens observed him holding onto the driver side door for balance. He appeared confused during the standard field sobriety tests and after performing the modified Romberg balance test, Stevens believed that he was impaired by the consumption of drugs. Stevens also administered the HGN test which revealed four of six clues indicating the Defendant was under the influence of a "CNS⁶ depressant" or inhalant. During the walk and turn test, Stevens scored the Defendant with seven out of eight clues and the Defendant showed no balance on the one leg stand test. Ultimately Stevens believed due to the Defendant's poor dexterity and his inability to follow instructions that he was under the influence of a CNS depressant/narcotic analgesic.

Defendant indicated to Stevens that his Oxycodone prescription bottle was inside the car. Stevenson noted that the bottle was recently filled on May 18, 2017 for 90 tablets; however no tablets remained.

At this point Defendant was placed under arrest and transported to UPMC-Susquehanna. Once there, Defendant was advised of his rights under the implied consent law. Since the DUI Center was not open, Stevens remained with the

⁶ Central nervous system

Defendant. Stevens did not tell Defendant that he needed to give blood, or that anything bad would happen if he refused the test. He advised the Defendant that he would be calling a cab for him when they were finished.

During their conversation, the Defendant told Stevens that he thought he was on Vine Avenue in Philadelphia. Stevens read the PennDOT DL 26B form. Stevens believed that the Defendant was following instructions and answered coherently as he reviewed the document with him. Stevens observed the Defendant sometimes “nodding off” but he appeared to understand what Stevens was asking. Stevens did not force, threaten or coerce the Defendant to sign the form.

When the phlebotomist arrived at about 11:09 PM, no one forced, raised their voice or threatened the Defendant to force him to allow the blood draw. He also appeared to understand and follow all of the requests of the phlebotomist. Defendant was never told that he had to give his blood.

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?

The Court does not find that the seizure of Defendant’s blood was a violation of Article 1 Section 8 of the Pennsylvania Constitution or the Fourth Amendment to the United States Constitution. Both sections protect against unreasonable searches and seizures; however, the Fourth Amendment provides for a good faith exception and the Pennsylvania Constitution does not.

Generally police are required to obtain a search warrant before conducting a Fourth Amendment search unless an exception applies. Exceptions to the warrant requirement include when the individual consents to the search. Our Supreme Court has applied the following standard to determine whether an individual has validly consented to a chemical test:

In determining the validity of a given consent, the Commonwealth bears the 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. Smith, 621 Pa. 218, 77 A.3d 562, 573 (2013) (internal citations and quotation marks omitted). ***Commonwealth v. Ennels***, 167 A.3d 716, 723 (Pa.Super., 2017).

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 must look 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) Factors in support of an involuntary blood draw are the fact that Defendant was under arrest at the time. He was handcuffed and transported

to the UPMC-Susquehanna in a police cruiser. His handcuffs would have been removed during his time in the hospital. Additionally, Defendant was advised that if he did not consent to the blood draw, that his driver's license would be suspended for 12 months at least, 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 it would be deemed to be a refusal. However, Defendant was not advised that there would be criminal consequences to his refusal, so those did not coerce him.

The Court finds Stevens credible in his testimony that Defendant was cooperative during the entirety of their exchange. The Court need only believe that the Defendant was not coerced into consenting to the blood draw and that his submission to the draw was voluntary. The Court also finds that the content of the revised DL26 form (e.g. the DL26B Form) does comply with the requirements of ***Birchfield***. The Court looks to the executed DL26B Form to support Stevens's testimony that Defendant was able to fill out that form properly. Defendant was not advised that there would be criminal consequences to his refusal, so those did not coerce him. In addition, the Court finds that is clear from the face of the document and the testimony of Stevens 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. The Court does not believe that the Defendant was coerced and so therefore will not suppress the the blood draw and the evidence obtained as a result.

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

In *Commonwealth v. Cleckley*, 558 Pa. 517, 738 A.2d 427, 429 (1999) the Pennsylvania Supreme Court held that

“Article I, Section 8 of the Pennsylvania Constitution does not require that the Commonwealth establish a knowing and intelligent waiver of the right to refuse consent in order for the consent to be valid. The test for the validity of a consent to search is the same for both the Fourth Amendment and Article I, Section 8, i.e., that the consent is given voluntarily. *Id.* at 433. Accordingly, the Commonwealth must prove “ 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.” Cited by *Commonwealth v. Strickler*, 563 Pa. 47, 757 A.2d 884, 901 (2000), *Commonwealth v. Mack*, 568 Pa. 329, 334, 796 A.2d 967, 970 (2002).

Therefore, Stevens was not required to advise Defendant that he had a right to refuse and this issue has no merit.

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

The Court does not need to 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 consequence.

ORDER

AND NOW, this _____ day of April, 2018, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Motion to Suppress is hereby DENIED.

BY THE COURT,

Nancy L. Butts, President Judge

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