IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**CR-2011-2013;**
	:	**CR-287-2013;**
v.	**:**	**CR-589-2013;**
	:	**CR-581-2013;**
BRIAN ALTMAN,	**:**	**CR-556-2014**
NATALIE HOFFORD,	**:**	
JESSE PLASTER,	**:**	
DERRICK OWENS,	**:**	
ELIZABETH MINIER,	**:**	
Defendants	**:**	**CRIMINAL DIVISION**

OPINION AND ORDER

On February 14, 2014, the Defendants filed a Motion in Limine to Preclude Blood Tests. Argument on the Defendants' motion was held on March 24, 2014.

I. Background

On September 14, 2013, while in Old Lycoming Township, Pennsylvania State Police Trooper David Walker (Walker) observed a Chevy Silverado travelling northbound on State Route 15 at varying speeds between 50 and 65 mph in a posted 55 mph speed zone. He also watched the vehicle weave within its lane and cross both the fog and center lines. After Walker watched the driver throw a lit cigarette out of the driver-side window, he stopped the vehicle. After identifying the operator of the vehicle as Defendant Brian Altman (Altman), Walker began speaking with Altman and noticed a strong odor of alcohol emanating from his breath. Walker also noticed that Altman's speech was slurred and his eyes were red and glassy. Walker asked Altman to exit the vehicle and perform field sobriety tests. The tests indicated that Altman was under the influence of alcohol. Altman was transported to the Lycoming County DUI Center, where his blood was drawn. A blood test indicated that Altman had a blood alcohol concentration (BAC) of 0.281% at the time his blood was drawn.

On July 21, 2012, Pennsylvania State Police Trooper Jonathan Buynak (Buynak) observed a silver SUV traveling south on Franklin Street in the city of Williamsport. When Buynak saw the vehicle turn west on East Fourth Street without using a turn signal, he initiated a traffic stop. After identifying the operator of the vehicle as Defendant Natalie Hofford (Hofford), Buynak observed that her eyes were red and glassy. Buynak also noticed a strong odor of alcohol emanating from Hofford's breath. Buynak asked Hofford to exit the vehicle and perform field sobriety tests. Hofford failed to complete the tests as instructed and demonstrated. A preliminary breath test indicated that Hofford had a BAC of 0.083%. Hofford was taken to the Lycoming County DUI Center, where her blood was drawn. A blood test indicated that Hofford had a BAC of 0.099% at the time her blood was drawn.

On December 27, 2012, Pennsylvania State Police Trooper Brandon Schrawder (Schrawder) observed Defendant Jesse Plaster (Plaster) sitting in the driver's seat of a running vehicle. Schrawder noticed a strong odor of alcohol emanating from Plaster's breath. Schrawder also observed two open bottles of beer in the vehicle's cup holders. Schrawder did not ask Plaster to perform field sobriety tests because of poor weather conditions. A preliminary breath test indicated that Plaster had BAC of at least 0.08%. Plaster was transported to the Williamsport DUI Center. He was given Implied Consent and *O'Connell* advisories. Plaster's blood was then drawn. A blood test indicated that Plaster had a BAC of 0.235% at the time his blood was drawn.

On August 19, 2012, Defendant Derrick Owens (Owens) was stopped by police after he was observed stumbling out of the vehicle that he had been driving erratically. Corporal Jeff Paulhamus (Paulhamus) of the Williamsport Bureau of Police noticed an odor of alcohol coming from inside the vehicle that Owens was driving. Paulhamus also noticed a strong odor of alcohol

emanating from Owens' breath. Paulhamus noticed that Owens was unsteady on his feet, and his speech was slurred. Owens was asked to perform field sobriety tests, which he could not complete. Owens was transported to the Lycoming County DUI Center, where his blood was drawn. A blood test indicated that Owens had a BAC of 0.23%.

On November 9, 2013, Pennsylvania State Police Trooper Michael Shipman (Shipman) was dispatched to a motor vehicle accident at the intersection of Washington Boulevard and River Avenue in Loyalsock Township. Upon arriving at the scene, he observed two vehicles at final rest at the intersection. According to a witness, a Nissan Versa that was traveling eastbound on Washington Boulevard went into the westbound lane to travel around a vehicle making a left turn. The Nissan hit the turning vehicle on the passenger side. Shipman spoke with the operator of the Nissan, Elizabeth Minier (Minier), at the Williamsport Hospital, where she had been transported after the accident. Shipman noticed that Minier had slurred speech and appeared very lethargic. Believing her to be under the influence of a controlled substance, he requested that she submit to a blood test, to which Minier consented. The test results showed the presence of metabolites of Marijuana, Methadone, and other prescription controlled substances in Minier's blood at the time she operated the vehicle.

The Commonwealth and Defense Counsel agree that law enforcement officers did not obtain a warrant before any of the Defendants had his or her blood drawn. All of the Defendants were advised of their right to refuse the blood draw. They were also instructed that if they refuse the blood draw and are convicted of Driving under the Influence,[1] they may be subject to more severe penalties, including more jail time, because of the refusal.

It should be noted that the Defendants do not argue that law enforcement lacked probable cause to arrest. The Defendants argue that the results of their blood tests should be suppressed

[1] 75 Pa. C.S. § 3802(a)(1).

because their blood was drawn without officers obtaining a warrant. In the Motion in Limine, Counsel for all Defendants essentially takes a three-pronged approach to his challenge of the blood tests. The Defendants initially argue that the results of the tests should be suppressed because there were no exigencies to justify the warrantless blood draws.

Next, the Defendants contend that under the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, law enforcement officers cannot conduct a warrantless blood draw pursuant to the implied consent provision of Pennsylvania's Motor Vehicle Code (Implied Consent Law).[2] In other words, the Defendants contend that the Implied Consent Law is unconstitutional.

Finally, the Defendants posit that they could not have voluntarily consented to the blood draws because of the warning law enforcement officers gave them that they may be subject to more jail time if they refuse the blood draws.

II. Discussion

The Fourth Amendment to the Constitution of the United States provides, "The right of the people to be secure in their persons . . . against unreasonable searches . . . shall not be violated. . . ." U.S. Const. amend. IV. All agree that the blood draws were searches subject to the protection of the Fourth Amendment. "'[C]ompelled intrusion into the body for blood to be

[2] 75 Pa. C.S. § 1547(a). Under the Implied Consent Law, "[a]ny person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle in violation of section . . . 3802 (relating to driving under influence of alcohol or controlled substance). . . ." 75 Pa. C.S. § 1547(a). In Commonwealth v. Quarles, the Court determined that "reasonable grounds" in the Implied Consent Law means probable cause. 324 A.2d 452, 466 (Pa. Super. 1974) (plurality opinion). "[P]olice may constitutionally conduct a chemical test of a suspect's blood, without having arrested him and without transporting him from the scene in order to conduct the test, if they have probable cause to believe that the suspect has been driving under the influence of alcohol or a controlled substance." Commonwealth v. Cieri, 499 A.2d 317, 322 (Pa. Super. 1985). "We see no reason why the existence of probable cause, which would unquestionably suffice as a constitutional basis for a test administered at the scene, may not also suffice as a constitutional basis for a test administered at the hospital." Id. at 324.

analyzed for alcohol content' must be deemed a Fourth Amendment search." Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616 (1989) (quoting Schmerber v. California, 384 U.S. 757, 768 (1966)).

"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). "One well-recognized exception [to the warrant requirement] applies when 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) (quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978)). Another exception to the warrant requirement is a search that is conducted pursuant to consent. *See* Schneckloth, 412 U.S. at 219.

A. Defendants Argue that No Exigent Circumstances Existed to Justify the Warrantless Blood Draws.

"In those drunk driving cases where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." Missouri v. McNeely, 133 S. Ct. 1552, 1561 (2013). "To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances." Id. at 1559. After reviewing the circumstances of each case, this court finds nothing which shows that the law enforcement officers faced an emergency that justified acting without a warrant. However, the lack of exigent circumstances does not render these blood draws unconstitutional. Law enforcement officers can conduct a warrantless search if they have consent.

B. Defendants Argue that Pennsylvania's Implied Consent Law is Unconstitutional.

Each time a provision of the Pennsylvania Constitution is implicated, it is both important and necessary that courts undertake an independent analysis of the Pennsylvania Constitution. Commonwealth v. Edmunds, 586 A.2d 887, 894-95 (Pa. 1991). Article I, Section 8 of the Pennsylvania Constitution[3] is mentioned in the Defendants' brief. Article I, Section 8, however, is not implicated. The Defendants' argument is that the Implied Consent Law is unconstitutional as a result of the decision of the Supreme Court of the United States in Missouri v. McNeely.[4] McNeely changed the minimum guarantees of the federal Constitution. These minimum guarantees are "equally applicable to the [analogous] state constitutional provision." Commonwealth v. Sell, 470 A.2d 457, 466-67 (Pa. 1983). A law cannot be unconstitutional under the federal Constitution but constitutional under the Pennsylvania Constitution. Other than the argument that the Implied Consent Law violates federal constitutional rights, the Defendants offer no argument as to why the Implied Consent Law violates state constitutional rights. Therefore, Article I, Section 8 is not implicated.

In McNeely, the defendant was stopped by a Missouri police officer for speeding and repeatedly crossing the centerline of the roadway. McNeely, 133 S. Ct. at 1556. The officer noticed that the defendant had blood-shot eyes, slurred speech, and the smell of alcohol on his breath. Id. The defendant performed poorly on field sobriety tests. Id. at 1557. The officer asked the defendant to submit to a breath test, which the defendant declined. Id. The defendant was taken to a hospital for a blood draw. Id. Despite the defendant refusing to give a sample, the officer directed a hospital employee to draw the blood. Id. The Supreme Court affirmed the

[3] The text of Article I, Section 8 is, "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." Pa. Const. Art. I, § 8.
[4] 133 S. Ct. 1552 (2013).

Missouri state court ruling that the nonconsensual and warrantless blood draw violated the defendant's Fourth Amendment right to be free from unreasonable searches of his person. Id. at 1568. The Supreme Court held that the natural dissipation of alcohol in the bloodstream does not alone create an exigency that justifies a warrantless blood draw. Id. at 1563 and 1568.

The Defendants argue that the natural dissipation of alcohol is the only reason for the Implied Consent Law, and, therefore, after McNeely, the law is unconstitutional. In McNeely, the Supreme Court wrote:

> States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. 133 S. Ct. at 1566.

This Court does not believe that the Supreme Court in McNeely would have approved implied consent laws as a way of enforcing drunk-driving laws and securing BAC evidence if McNeely made implied consent laws unconstitutional. Nothing in McNeely suggests that implied consent laws violate any constitutional right.

Furthermore, the natural dissipation of alcohol and controlled substances is not the only reason for the Implied Consent Law. "[T]he implied consent scheme adopted by [Pennsylvania's] legislature is designed to do more than just preserve evanescent evidence. . . . [T]he scheme is designed to facilitate prosecution of chemically impaired drivers." Commonwealth v. Reidel, 651 A.2d 135, 141 (Pa. 1994) (citing Commonwealth v. Kohl, 615 A.2d 308, 314 (Pa. 1992)).

The Defendants claim that Reidel was "overturned" by Commonwealth v. Shaw, 770 A.2d 295 (Pa. 2001). This claim is incorrect. In Reidel, the court held that a warrantless blood

draw conducted pursuant to a provision[5] in Pennsylvania's Motor Vehicle Code did not violate Fourth Amendment rights because the provision required that there be probable cause to believe the person having blood drawn was driving under the influence of alcohol or a controlled substance. Reidel at 140-41. In Shaw, the Court held that a warrantless blood draw that was not conducted pursuant to exigent circumstances or a provision in the Motor Vehicle Code violated Article I, Section 8 of the Pennsylvania Constitution. 770 A.2d at 299. Shaw is factually different than Reidel. In Reidel, the blood draw was conducted pursuant to a provision in the Motor Vehicle Code. In Shaw, the blood draw was not conducted pursuant to a provision.

Because the Supreme Court approved implied consent laws in McNeely and because the Implied Consent Law is designed to facilitate prosecution of impaired drivers, this Court finds that the Defendants have not shown that the Implied Consent Law is unconstitutional.

C. Defendants Argue that They did not Voluntarily Consent to the Blood Draws.

Finally, the Defendants argue that they did not voluntarily consent to the blood draws because their consent was coerced. The Defendants argue that they were coerced by law enforcement as they were told that they may be subject to more jail time if they refuse the blood draws.

"[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Schneckloth, 412 U.S. at 227. The following is a non-exclusive list of factors which may be considered in assessing the legality of a consensual search:

1. the presence or absence of police excesses;
2. physical contact or police direction of the subject's movements;
3. the demeanor of the police officer;
4. the location of the encounter;

[5] 75 Pa. C.S. § 3755.

5. the manner of expression used by the officer in addressing the subject;
6. the content of the interrogatories or statements;
7. whether the subject was told that he or she was free to leave; and
8. the maturity, sophistication and mental or emotional state of the defendant (including age, intelligence and capacity to exercise free will).

Commonwealth v. Bell, 871 A.2d 267, 273-74 (Pa. Super. 2005) (citing Commonwealth v. Strickler, 757 A.2d 884, 897-98 (Pa. 2000)).

In South Dakota v. Neville, the Supreme Court wrote, "Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice." 459 U.S. 553, 563 (1983). In Neville, the Supreme Court also wrote, "[T]choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices." Id. at 564.

In State v. Brooks,[6] the Supreme Court of Minnesota decided the issue that this Court faces. In Brooks, the defendant was arrested on three separate occasions for suspicion of driving while impaired. Nos. A11-1042, A11-1043, 2013 WL 1704706, at 2-5. After each arrest, the defendant was given an opportunity to speak with his lawyer. Id. In addition, the defendant was read Minnesota's implied consent advisory, which notifies an arrestee that it is a crime to refuse to provide a sample of body fluid for chemical testing. Id. After being read the advisory and speaking with his lawyer, the defendant agreed to provide police with samples of his body fluids. Id. On two of the occasions, the defendant provided a urine sample. Id. On the other occasion, his blood was drawn. Id. at 3. Tests on the samples indicated that the defendant was driving while his BAC was above the legal limit. Id. at 2-5. The defendant argued that the results of his tests should be suppressed because he did not consent to the chemical tests. Id. at 9. The

[6] Nos. A11-1042, A11-1043, 2013 WL 1704706, at 13 (Minn. October 23, 2013).

defendant argued that he did not consent because he agreed to submit to the testing only after police told him that refusal to submit was a crime. Id. The court held that "a driver's decision to agree to take a [chemical] test is not coerced simply because Minnesota has attached a penalty of making it a crime to refuse the test." Id. at 13.

The Defendants contend that in State v. Butler,[7] "the Arizona Supreme Court ruled that consenting to a chemical test after being read implied consent warnings does not satisfy the consent requirements imposed by the constitution as explained in *McNeely*." The Defendants' contention is incorrect. In State v. Butler, the Arizona Supreme Court determined that the trial court did not abuse its discretion when the trial court ruled that an individual's consent had been involuntary under the totality of the circumstances. No. CV-12-0402-PR, at 11. In Butler, the reading of an implied consent advisory was not the only fact that led the trial court to conclude that the consent was involuntary. Id. at 10-11. There were several facts that led the trial court to this conclusion. Id. Among these several facts were the defendant's young age and a law enforcement officer's statement, "You are required to submit to the specified tests." Id. at 11.

The Defendants also argue that the Supreme Court's decision in Bumper v. North Carolina[8] supports the argument that the law enforcement officers coerced their consent. In Bumper, a home owner allowed police to search her house after police told her that they had a warrant. Bumper, 391 U.S. at 546. The search yielded evidence of a crime. Id. At a hearing to determine whether the evidence should be excluded from trial, a prosecutor argued that the owner had consented to the search of her house. Id. The prosecutor did not rely on a warrant to justify the search. Id. The Supreme Court held that the homeowner had not consented to the search. Id. at 548. The Court wrote:

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[7] No. CV-12-0402-PR (Ariz. May, 30 2013).
[8] 391 U.S. 543 (1968).

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion – albeit colorably lawful coercion. Where there is coercion there cannot be consent. Id. at 549.

Bumper does not support the Defendants' argument that they were coerced because Bumper is factually different than these cases. *See* Brooks, Nos. A11-1042, A11-1043, 2013 WL 1704706, at 14-15. In Bumper, the homeowner believed that she had no right to resist the search. Unlike the homeowner in Bumper, the Defendants knew that they could refuse the searches.

In the instant case, the Defendants were notified that they could refuse the blood draws. They do not allege that law enforcement acted excessively or misled them. The Defendants' argument is based strictly on law enforcement notifying the Defendants that they may be subject to more jail time if they refuse the blood draw. The Defendants are adults. Law enforcement presented them with difficult choices, but the Court finds that Defendants voluntarily made their decisions and consented to the blood draws.

III. Conclusion

The warrantless blood draws were constitutional because the Defendants voluntarily consented to them. When a police officer has reasonable grounds to believe a person is operating a vehicle under the influence of drugs and / or alcohol, the officer can request a blood draw. Notifying the person of the penalties for refusing the blood draw is not inherently coercive and does not make consent involuntary.

ORDER

AND NOW, this _____ day of August, 2014, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendants' Motion to Preclude Blood Tests is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge