IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR – 1098 – 2015
	:	
vs.	:	CRIMINAL DIVISION
	:	
THOMAS S. BELL,	:	
Defendant	:	Motion for Reconsideration

OPINION AND ORDER

Before the Court is Defendant's Motion for Reconsideration, filed July 1, 2016. Argument on the motion was heard July 15, 2016, following which the Commonwealth requested and was granted a period of time in which to file a responsive brief. That brief was filed August 15, 2016 and the matter is now ripe for decision.[1]

By Order dated April 28, 2016, this court denied Defendant's Motion to Dismiss, which sought to dismiss count 1 of the Information, driving under the influence of alcohol (refusal).[2] Defendant had argued that he had a constitutional right to refuse to submit a sample of his blood for testing without a search warrant and that the refusal should be suppressed and the charge dismissed.[3] After a non-jury trial, held that date, Defendant was convicted of the charge and sentencing was scheduled for August 29, 2016.

In the instant motion for reconsideration, Defendant points to the recent decision of the Supreme Court of the United States in Birchfield v. North Dakota, 136 S. Ct. 2160, 2172 (2016), where the Court addressed the issue of "whether

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[1] Defendant filed a response to that brief on August 17, 2016.
[2] 75 Pa.C.S. Section 3802(a)(1).
[3] The motion was denied based on the reasoning in Commonwealth v. Altman, No. CR-2011-2013 (Butts, P.J., August 15, 2014).

motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream". With respect to at least blood tests,[4] the Court answered the question in the negative. After holding that warrantless blood tests violate a motorist's Fourth Amendment right to be free from unreasonable searches, the Court also rejected the claim that consent (presumed under the implied-consent laws) eliminates the need for a warrant, concluding that "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",[5] and that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense".[6]

The Commonwealth agrees that under Birchfield, Defendant's sentence cannot be enhanced because of the refusal in this case. The issue has thus become whether Defendant should be granted a new trial because evidence of the refusal was introduced to show consciousness of guilt,[7] and, in this case, the court in explaining its verdict indicated that that evidence was instrumental in the conviction.

Initially, the Commonwealth argues that Defendant waived his right to now raise this issue as he did not object at trial to the officer's testimony regarding Defendant's refusal. The court does not agree that the issue has been waived. First, at the time of trial, evidence of the refusal was necessary for later sentencing purposes, and any objection would have been futile. Moreover,

[4] Breath tests were held to not violate the Fourth Amendment.
[5] Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (2016)
[6] Id. at 2186.
[7] Defendant is not entitled to have the charge dismissed because the refusal was not an element of the crime.

Defendant did raise the issue in his motion to dismiss, which was argued and ruled on just prior to trial. The court will therefore address the merits of the issue.

In Commonwealth v. Welch, 585 A.2d 517 (Pa. Super. 1991), wherein the defendant had refused a warrantless search of her bedroom, the Superior Court held that one's exercise of his Fourth Amendment right to be free from warrantless searches cannot be used as evidence of consciousness of guilt.[8] The Court stated: "The point of significance is that one should not be penalized for asserting a constitutional right. It is the assertion of a right that we must focus on. We believe that the assertion of a right cannot be used to infer the presence of a guilty conscience." Id. at 520. Since Birchfield has now declared that there is a Fourth Amendment right to be free from warrantless blood tests following arrest for drunken driving, it follows under Welch that evidence of a defendant's refusal to take such a test cannot be used as evidence of consciousness of guilt.

In their brief, instead of addressing Welch, the Commonwealth instead points to a recent Franklin County decision which addressed the same issue raised herein: Commonwealth v. Oliver, No. 52 of 2015 (Franklin County, Zook, J., August 5, 2016). Relying on Commonwealth v. Graham, 703 A.2d 510 (Pa.

[8] In reaching this conclusion, the Court reasoned as follows: "As we read the various comments made by the courts regarding the assertion of one's Fifth Amendment right, the overriding tone is that it is philosophically repugnant to the extension of constitutional rights that assertion of that right be somehow used against the individual asserting it. Although the cases have discussed the Fifth Amendment right we see no reason to treat one's assertion of a Fourth Amendment right any differently. It would seem just as illogical to extend protections against unreasonable searches and seizures, including the obtaining of a warrant prior to implementing a search, and to also recognize an individual's right to refuse a warrantless search, yet allow testimony regarding such an assertion of that right at trial in a manner suggesting that it is indicative of one's guilt. To allow such testimony essentially puts the individual in the same kind of no win situation that would exist if the above outlined decisions were to the contrary. With respect to the Fifth Amendment, one would be forced to choose between speaking after arrest at the expense of possibly incriminating himself, or refusing to speak and having this fact brought up at trial, thereby inferentially incriminating himself. With respect to a search, one would have to choose between allowing a search of one's possessions, or having the refusal be construed as evidence that one was hiding something. To the extent an assertion of such a right will often be construed by the lay juror as an indication of a guilty conscience, allowing testimony of the assertion of the right will essentially vitiate any benefit conferred by the extension of the right in the first instance, thus, rendering the right illusory.

Super. 1997), which relied on Schmerber v. California, 384 U.S. 757 (1966), the court concluded that "a defendant has no constitutional right to refuse a chemical test in the Commonwealth of Pennsylvania" and, therefore, "such evidence is admissible at trial". Commonwealth v. Oliver, supra, at 9-10. Schmerber and Graham both addressed the Fifth Amendment privilege against self-incrimination, however, and cannot control on this issue when the United States Supreme Court has just announced that there *is* a Fourth Amendment right to refuse a warrantless blood test. This court does not agree with Franklin County's dismissal of Birchfield simply because it did not address the evidentiary issue presented herein. Rather than being of "little assistance", Id. at 5, Birchfield is the foundation upon which the analysis should be built.

The court does recognize the statement in Birchfield, deemed controlling by the court in Oliver, wherein the Court noted that "[o]ur opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply" and that "nothing we say here should be read to cast doubt on them." As the evidentiary issue presented herein was not before the Court, however, this court concludes that the reference to evidentiary consequences is merely dicta and does not require a different result from that reached herein.[9] After all, the Court had framed the issue as one of "whether motorists lawfully arrested for drunk driving may be convicted of a crime or *otherwise penalized* for refusing to take a warrantless test measuring the alcohol in their bloodstream". Birchfield, *supra*, at 2172. Considering our Superior Court's determination, with which this court agrees, that by allowing the use of evidence of one's exercise of a constitutional

[9] The Court may very well have been referring to *civil* evidentiary consequences.

right against him, one is being "penalized", the matter is clearly controlled Birchfield's *main* point: a warrantless blood test violates a defendant's right to be free from unreasonable searches and he thus has a constitutional right to refuse it, which refusal cannot provide the basis for him to be convicted of a crime or otherwise penalized.

Accordingly, in light of this court's consideration at trial of Defendant's refusal, and the weight given that evidence by this court as factfinder, the court enters the following:

ORDER

AND NOW, this day of August 2016, the matter having been reconsidered and for the foregoing reasons, Defendant's request that Count 1 be dismissed is hereby DENIED, but the request for a new trial is hereby GRANTED. The Deputy Court Administrator is requested to list this case during the next trial term. The sentencing hearing scheduled for August 29, 2016 is hereby cancelled.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Eileen Dgien, DCA
DA
Peter T. Campana, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson