IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-1890-2015**
v.	:	
	:	
GARY STANLEY HELMINIAK,	:	**PRETRIAL MOTION**
Defendant	:	

OPINION AND ORDER

On January 19, 2016, the Defendant filed a Motion to Suppress Evidence. On February 17, 2016, Defendant filed a Supplement to the Motion to Suppress Evidence. A hearing on the initial motion was held on February 19, 2016. On that same date the Court issued an order stating that the additional issues raised in the Supplemental motion would be decided on the briefs. On March 7, 2016, this court filed an Opinion and Order Denying the initial suppression motion. The subject of the this opinion and order is a decision on the Supplement to the Motion to Suppress Evidence based on the briefs filed by the Defendant on March 4, 2016, and the Commonwealth on March 21, 2016.

I. Background

The Defendant is charged with Count 1 DUI under 75 Pa.C.S. § 3802 (a)(1) **Driving under influence of alcohol or controlled substance. (a) General impairment,** an ungraded misdemeanor. The information charges that this is Defendant's second offense. The Defendant is charged with Count 2 DUI under 75 Pa.C.S. § 3802(c) **Highest rate of alcohol**, also an ungraded misdemeanor. The Criminal Information lists Count 2 as Defendant's first offense. The Defendant is charged with Count 3 **Duty to Give Information and Render Aid**, a summary offense, under 75 Pa.C.S. 3744(a).

The charges against the Defendant stem from an incident which occurred on August 12, 2015. On that date, Defendant was a patron at the Valley Inn, located at 204 Valley Street, Williamsport, PA, 17702.

At 9:12 p.m. on August 12, 2015, Pennsylvania State Trooper Mark McDermott was dispatched to a reported crash in the parking lot of the Valley Inn restaurant. McDermott arrived at the restaurant at 9:33 p.m. He talked with driver of the damaged vehicle, Schwanbeck, who reported that the Defendant said his name was "Gary Helminiak". Shwanbeck told Trooper McDermott that Defendant said that he did not have his insurance information and that there was no damage to Schwanbeck's vehicle. Trooper McDermott examined Schwanbeck's vehicle and saw damage on the left portion of the front bumper.

McDermott went to the restaurant's kitchen door and asked the bartender to send out Gary Helminiak. McDermott waited four or five minutes, but the Defendant did not exit. McDermott then entered the restaurant and asked the bartender to point to Gary Helminiak. McDermott told the Defendant that he would like to speak with him. The Defendant said that he would speak with McDermott, and they both walked out of the bar and into the parking lot. McDermott held the door for the Defendant. He neither handcuffed the Defendant nor threatened him. As they were walking, McDermott noticed that the Defendant was unsure of his footing. McDermott smelled an odor of alcohol and noticed that the Defendant had glassy eyes and dilated pupils.

According to the Affidavit of Probable Cause, PA State Trooper McDermott asked Defendant to perform the following field sobriety tests: the Horizontal Gaze Nystagmus, the Walk and Turn, the One Leg Stand and a preliminary breath test. Defendant "exhibited multiple clues on each test and was arrested for suspicion of DUI at approximately 2155 hours on

08/12/15…[Defendant] was then transported to the Williamsport Hospital where he was read his Implied Consent and O'Connell Warnings. Defendant submitted to a blood draw and at approximately 2228 hours on 8/12/15, two gray tubes of blood were removed from [Defendant's] arm by [l]ab [t]technician…On 8/31/15, I [Trooper McDermott] received the official blood results…The results showed a BAC of 0.23%. Affidavit of Probable Cause Docket Number CR-182-15 OTN T 704675-6 page 2 of 2.

B. Arguments

Defendant's counsel argues that Pennsylvania's Implied Consent Law is unconstitutional pursuant to the United States Supreme Court decision in Missouri v. McNeely, 133 S.Ct. 1552, (2013), which held that absent exigent circumstances, a warrant should issue before an invasive procedure such a blood draw takes place on a defendant who did not consent to having his/her blood drawn. The question presented was whether the natural metabolization of alcohol in the bloodstream presented a *per se* exigency that justified an exception to the Fourth Amendment's warrant requirement for nonconsensual [emphasis Trial Court's own] blood testing in all drunk-driving cases. The Court held that it did not. Missouri v. McNeely, 133 S. Ct. 1552 (U.S. 2013).

The Supreme Court of the United State in its Missouri opinion approved of Implied Consent Laws as a remedy to nonconsensual warrantless blood draws stating

> 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.

The Commonwealth and Defendant's Counsel cite various cases from other jurisdictions to bolster their arguments that Pennsylvania's implied consent is or is not constitutional. The Trial Court will look to what the law of Pennsylvania is at the time the offense occurred. Pennsylvania's Implied Consent Law is found in Title 75. Vehicles. Chapter 15. Licensing of Drivers. Subchapter B. Comprehensive System for Driving Education and Control. Section 1547:

> **§ 1547. Chemical testing to determine amount of alcohol or controlled substance.**
>
> **(a) General rule. --**
>
> Any 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:
>
> …
>
> **(b) Suspension for refusal.**
>
> (1) If any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person as follows:
>
> (i) Except as set forth in subparagraph (ii), for a period of 12 months.
>
> (2) It shall be the duty of the police officer to inform the person that:
>
> (i) the person's operating privilege will be suspended upon refusal to submit to chemical testing; and

(ii) if the person refuses to submit to chemical testing, upon conviction or plea for violating section 3802(a)(1), the person will be subject to the penalties provided in section 3804(c) (relating to penalties).[1]

(3) Any person whose operating privilege is suspended under the provisions of this section shall have the same right of appeal as provided for in cases of suspension for other reasons.

(c) Test results admissible in evidence. --

In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3802 or any other violation of this title arising out of the same action, the amount of alcohol or controlled substance in the defendant's blood, as shown by chemical testing of the person's breath, blood or urine, which tests were conducted by qualified persons using approved equipment, shall be admissible in evidence.

…

(d) Presumptions from amount of alcohol. --

(Repealed).

(e) Refusal admissible in evidence. --

In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3802 or any other violation of this title arising out of the same action, the fact that the defendant refused to submit to chemical testing as required by subsection (a) may be introduced in evidence along with other testimony concerning the circumstances of the refusal. No presumptions shall arise from this evidence but it may be considered along with other factors concerning the charge.

Whether a warrantless blood test of a drunk-driving suspect is reasonable has to be determined case by case based on the totality of the circumstances. Reading from a standard implied consent form, the Police Officer explained to the Defendant in McNeely that under state

[1] (c) Incapacity; highest blood alcohol; controlled substances. --An individual who violates section 3802(a)(1) and refused testing of blood or breath or an individual who violates section 3802(c) or (d) shall be sentenced as follows: (1) For a first offense, to: (i) undergo imprisonment of not less than 72 consecutive hours; (ii) pay a fine of not less than $1,000 nor more than $ 5,000; (iii) attend an alcohol highway safety school approved by the department; and (iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815…**75 Pa.C.S. § 3804 (c).**

law refusal to submit voluntarily to the test would lead to the immediate revocation of his driver's license for one year and could be used against him in a future prosecution. See Mo. Ann. Stat. §§577.020.1, 577.041 (West 2011). McNeely nonetheless refused. McNeely failed field sobriety tests, refused a breath test, and refused to consent to a blood draw. The Police Officer directed hospital personnel to draw McNeely's blood. McNeely moved to suppress the blood test results. The Trial Court granted the suppression and it was later affirmed by the intermediate appellate court in Missouri. The Supreme Court of the State of Missouri also affirmed the trial judge's decision to suppress the evidence and the judgment was eventually affirmed by the United States Supreme Court, on April 17, 2013.

The Supreme Court of the United States took note that as an initial matter, 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. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution. South Dakota v. Neville, 459 U.S. 553, 554, 563-564, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983) (holding that the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination). Missouri v. McNeely, 133 S. Ct. 1552 (U.S. 2013). As in the Missouri statute the Supreme Court cites, the Pennsylvania Implied Consent Statute (see above) also provides for a 12 month license suspension if a motorist refuses to submit to chemical testing after a request from law

enforcement that include the statements as required by Statute. Trooper McDermott stated he gave the implied consent warnings and the Trial Court finds him credible in his statements to the Court.

Defense Counsel cites State v. Birchfield, 858 NW2d 302 (N.D. 2015), which the Supreme Court of the United States has granted certiorari on, for the proposition that the blood test statutes in North Dakota and Minnesota are unconstitutional under the "Unconstitutional Conditions Doctrine". Defendant's Brief in Support of Motion to Suppress Evidence and Supplement to Motion to Suppress Evidence, 3/4/16, p. 6. In North Dakota, refusal to submit to a chemical blood test is a Class B Misdemeanor. Refusal to submit to a chemical blood test in Pennsylvania is not a crime. It does have implications for a person that wants to remain a driver in the Commonwealth of Pennsylvania (see 75 Pa CS 3804 section C above); however, being called into court on the criminal charge of "refusal to submit to a chemical blood test" with a grade of misdemeanor is not one of them. The Superior Court of Pennsylvania holds that the implied consent provision, 75 Pa.C.S.A. 1547(a)(1), does not violate defendants rights against unreasonable search and seizure under the Pennsylvania constitution. As the Superior Court has explained:

> At its heart, the request to submit to a BAC test is a request for a search and/or seizure of the person who is the subject of the request, and is therefore a matter of search and seizure law, or a derivative thereof. A BAC test is evidence of a person's level of intoxication and, technically speaking, once a police officer develops probable cause to believe a driver has been driving under the influence of intoxicating substances, the state may constitutionally seek evidence to this effect. Commonwealth v. Ciccola, 894 A.2d 744, 747 (Pa. Super. Ct. 2006) citing Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

Additionally, the Supreme Court of Pennsylvania has held that criminal convictions do not merge for operating privilege suspension under the Vehicle Code and thus reversed a Commonwealth Court decision that found the criminal doctrine of merger is applicable in the civil arena of operating privilege suspensions under 75 Pa.C.S. §§ 1532(a), (a.1). Bell v.

Commonwealth, 626 Pa. 270, 272 (Pa. 2014). If there were criminal liability as a direct consequence of refusing a chemical blood test than Defendant's argument may have traction and the Defendant in Birchfield progresses in this vane. Defense Counsel cited State v. Trahan, 870 NW 2d 396 (Minn. Ct. App. 2015) in support of the proposition that Pennsylvania's Implied Consent law forces every Pennsylvania citizen to waive his/her right to be free from unreasonable searches of the person's blood without a warrant. Defendant's Brief, 3/4/16, p. 8. The Trial Court is not persuaded because as it is in North Dakota, refusing to submit to a blood draw in Minnesota has criminal consequences, **Subd. 2. Refusal to submit to chemical test crime**. -- It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license). Minn. Stat. § 169A.20. Pennsylvania law has no corollary.

Conclusion

The blood alcohol test results, a test to which Defendant actually consented and for which all people who legally operate motor vehicles consent to by implication, with only civil penalties if they do not, can be admitted into evidence pursuant to 75 Pa CS 1547(c), see above.

ORDER

AND NOW, this 31st day of May, 2016, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Supplemental Motion to Suppress Evidence which was filed on February 17, 2016, is hereby DENIED.

BY THE COURT,

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Nancy L. Butts, President Judge

cc: District Attorney
Pete Campana, Esq.