

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : CR 1083-2014

VS. :

KIRK HAYS :

ORDER

AND NOW, this 14th day of October, 2016, after review of briefs and oral argument, the Defendants' motion for a new trial is GRANTED. The case of Birchfield vs. North Dakota, 136 S.Ct. 2160(2016), is so broad in its constitutional proportions and pronouncement that no other result seems possible to the Court in this case under the facts of this case.

The Court does not accept the Commonwealth's argument on failure to preserve. It should be noted that the case cited of Commonwealth vs. Cabeza, 503 Pa. 228 (Pa. 1983), was not a constitutional case or a case of constitutional rights. Cases of constitutional rights are decided differently and the retroactive effect of such a case is much more broad as noted in Defendant's brief. The Court also rejects the diminished record argument made by the Commonwealth. The D'Alessandro vs. Pennsylvania State Police, 504 Pa. 300 (Pa. 2007), was, in fact, an administrative license review and not a case that involved the criminal burden of proof that we have here. The Court acknowledges in this case, and it is of overriding importance, that the general impairment evidence was very weak without the BAC. In fact, the Jury questioned whether they could consider the BAC. The Court is not deciding this case on the sufficiency of the evidence, necessarily, however that is certainly a factor to be considered.

Finally, the Court believes that the case of Commonwealth vs. Marshall, 824 A.2d 323 (Pa.Super 2003), cited by the Defense is very persuasive. There the Superior Court held that evidence of inadmissible preliminary breath tests prejudiced the defendant in a general

impairment case and the Superior Court ordered a new trial. The Court believes Mr. Hays was similarly prejudiced by the unconstitutional BAC evidence in this case and a new trial is therefore required.

BY THE COURT,

Hon. Richard A. Gray, Judge

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