

**IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PENNSYLVANIA**

**ANTHONY MARCHESE,
Petitioner**

vs.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING
Respondent**

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: **NO. 16-00157**
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Dated: November 10, 2016

OPINION AND ORDER

I. PROCEDURAL HISTORY

Anthony Marchese (“Petitioner”) has appealed an Official Notice of Suspension issued by the Department of Transportation, mailed on January 12, 2016, which suspended Petitioner’s driver’s license for a period of 18 months beginning February 16, 2016, due to his violation of Section 1547 of the Pennsylvania Vehicle Code. The Appeal was filed on February 3, 2016, and scheduled for June 7, 2016, at which time the hearing was continued until August 23, 2016. The hearing was held August 23, 2016, before this Court. At the time of the hearing, Kelly Solomon, Esquire, was present on behalf of the Commonwealth, and Peter T. Campana, Esquire, was present on behalf of Mr. Marchese. A brief was submitted on behalf of Petitioner on September 6, 2016. The Commonwealth’s reply brief was submitted on October 5, 2016.

II. FACTS

On August 23, 2016, after oral argument of the attorneys and entry of exhibits in the matter of ***Anthony Marchese v. Commonwealth of Pennsylvania Department of Transportation***, the following facts were determined to have occurred. Both attorneys were given the opportunity to submit briefs to the Court.

On November 29, 2015, Petitioner, Anthony Marchese, was operating his motor vehicle in the City of Williamsport. He was stopped by Pennsylvania State Police Trooper Adam Kirk for violations of the Pennsylvania Code, 75 Pa.C.S. §101, *et seq.* Trooper Kirk detected a strong odor of burnt marijuana as he approached Petitioner's vehicle. Petitioner was required to exit his vehicle, at which time the police located a glass container which contained a green leafy residue that field tested positive for marijuana. Trooper Kirk also observed that the Petitioner had glassy, bloodshot eyes and a green, leafy substance in his mouth. Petitioner was required to perform various field sobriety tests and, based on his performance and Trooper Kirk's observations, was placed under arrest for suspected DUI and transported to the Williamsport Hospital.

At approximately 1:21 a.m., Petitioner declined to complete a requested DRE evaluation. Trooper Kirk testified that he then read the form DL-26 word for word to Petitioner and asked him to consent to a withdrawal of a sample of Petitioner's blood for chemical testing pursuant to 75 Pa.C.S. §1547. The Petitioner refused, and as a result of said refusal Trooper Kirk submitted the required paperwork to the Department of Transportation, which issued the Notice of Suspension that is the subject of this appeal.

II. DISCUSSION

Petitioner argues that Pennsylvania's Implied Consent Law is unconstitutional in that it requires suspension of a driver's operating privilege when he or she exercises a constitutional right not to consent to a warrantless seizure of blood for chemical testing. The Petitioner relies on the recent United States Supreme Court case of ***Birchfield v. North Dakota***, 136 S.Ct. 2160 (2016), in which the Court held that warrantless blood tests violate a motorist's Fourth Amendment right to be free from unreasonable searches, and argues that the suspension of his operating privilege on account of refusing a warrantless seizure of blood is unconstitutional.

The governing authority on license suspensions in relation to refusal to submit to a chemical blood test is 75 Pa.C.S. §1547 which states:

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:

(1) in violation of section 1543(b)(1.1) (relating to driving while operating privilege is suspended or revoked), 3802 (relating to driving under influence of alcohol or controlled substance) or 3808(a)(2) (relating to illegally operating a motor vehicle not equipped with ignition interlock); or

(2) which was involved in an accident in which the operator or passenger of any vehicle involved or a pedestrian required treatment at a medical facility or was killed.

(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.

(ii) For a period of 18 months if any of the following apply:

(A) The person's operating privileges have previously been suspended under this subsection.

(B) The person has, prior to the refusal under this paragraph, been sentenced for:

(I) an offense under section 3802;

(II) an offense under former section 3731;

(III) an offense equivalent to an offense under subclause (I) or (II); or

(IV) a combination of the offenses set forth in this clause.

(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).

(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.

75 Pa.C.S. §1547(b)(2) is referred to as the implied consent law. ***Martinovic v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing***, 881 A.2d 30, 36 (Pa. Commw. Ct. 2005).

To issue a . . . suspension of Licensee’s operating privilege under *Section 1547 (b) (1)* of the Vehicle Code, the Department has the burden of proving that (1) Licensee was arrested for violating *Section 3802* of the Vehicle Code by a police officer who had “reasonable grounds to believe” that Licensee was operating or was in actual physical control of the movement of a vehicle while in violation of *Section 3802* (i.e., while driving under the influence); (2) Licensee was asked to submit to a chemical test; (3) Licensee refused to do so; and (4) Licensee was specifically warned that a refusal would result in the suspension of his operating privileges and would result in enhanced penalties if he was later convicted of violating *Section 3802 (a)(1)*.

Martinovic at 34 (citing ***Department of Transportation, Bureau of Driver Licensing v. Boucher***, 547 Pa. 440, 691 A.2d 450 (1997)). This Court finds that, through the testimony of Trooper Kirk and the introduction of Exhibit C-1, which includes the Report of Refusal to Submit to Chemical Testing and the Report of the Clerk of Courts Showing the Conviction of any Violation of the Vehicle Code, the Bureau of Driver Licensing satisfied its *prima facie* burden.

Petitioner does not appear to be challenging that any of the elements of 75 Pa.C.S. §1547 have not been met, but rather that there should be no consequences for his refusal because Trooper Kirk simply requested that he submit to a blood test rather than obtaining a search warrant and forcing Petitioner to submit to the test.

While the Supreme Court, in its ***Birchfield*** decision, held that state statutes which make it a crime to refuse chemical blood tests are unconstitutional, the Supreme Court stated the following regarding civil penalties resulting from implied-consent laws:

Our prior 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 nothing we say here should be read to cast doubt on them.

Birchfield, 136 S.Ct. at 2185.

This Court finds that Petitioner's argument, in light of ***Birchfield***, that Pennsylvania's implied consent law is unconstitutional and the civil penalties imposed for refusing to comply are invalid, is without merit. The ***Birchfield*** decision made clear that, *in criminal cases*, a blood test is considered a search which requires a warrant under the 4th Amendment prior to conducting such a test and, therefore, the failure to consent to a warrantless blood draw cannot result in *criminal* penalties. Here, Petitioner refused to consent to the chemical blood test that was requested by Trooper Kirk, even after Petitioner was read the warning regarding the consequences of failing to consent. Upon Petitioner's refusal to submit to the blood test, Trooper Kirk submitted the report to the Department of Transportation, thus involving the Bureau of Driver Licensing, which invoked the license suspension which is the subject of this appeal. This case, and the suspension imposed on Petitioner, is distinguishable from ***Birchfield*** because unlike the warnings given in North Dakota, Pennsylvania's DL-26 form does not advise the vehicle operator that it is a *crime* to refuse an officer's request for a blood test. "A license suspension stemming from a refusal to submit to chemical testing is a separate administrative proceeding."

Bashore v. Dep't. of Transportation, Bureau of Driver Licensing, 27 A.3d 272, 275 (Pa. Commw. Ct. 2011). The suspension of Petitioner's license is a *civil* penalty, mandatorily imposed when a vehicle operator, under arrest for driving under the influence, refuses to submit to a chemical test when asked by a police officer. Therefore, the ***Birchfield*** decision does not apply to a *civil* appeal of a suspension of operating privileges.

CONCLUSION

The Petitioner has failed to convince the Court that the ***Birchfield*** decision is applicable in his situation and that the suspension of his operating privileges resulting from his refusal to submit to a chemical blood test upon his arrest for suspicion of DUI should be dismissed. Because refusal to submit to chemical testing is not a crime in Pennsylvania, the civil penalty imposed is not unconstitutional. The Petitioner's eighteen month license suspension, issued as a result of Petitioner's refusal to take a chemical blood test pursuant to 75 Pa. C.S. § 1547, is reinstated.

BY THE COURT,

Joy Reynolds McCoy, Judge