IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
vs.	**: No.**	**CR-1943-2016**
	:	
MICHAEL DeSCISCIO,	**:**	
Defendant	**:**	

OPINION AND ORDER

On September 13, 2016, Defendant Michael DeSciscio was charged with driving under the influence (DUI) and summary offenses. Defendant's formal court arraignment was scheduled for November 21, 2016. Defendant waived his arraignment. In his waiver, Defendant acknowledged that he was advised of the time limits within which omnibus pretrial motions must be filed.

By Order dated November 14, 2016, Defendant was scheduled for a guilty plea on January 20, 2017. The hearing was continued at the request of defense counsel to April 28, 2017.

On March 1, 2017, Defendant filed a motion to suppress the blood test results. In his motion, Defendant challenged the lawfulness of the seizure and search of his blood. Defendant contended that the police seized and searched his blood without a valid warrant, without exigent circumstances, and without Defendant's actual, voluntary, knowing and intelligent consent.

At the request of defense counsel, an argument on the motion was scheduled for June 13, 2017, along with similar motions in several other cases. The untimeliness of this motion (and several others) was raised and argued.

Defense counsel argued that the motion to suppress should be heard "in the interests of justice." He indicated that in late 2016/early 2017 he and co-counsel discussed and formulated their "cutting edge" argument for this defense. Counsel also noted that at least some of the motions were filed within 30 days of the Superior Court's decision in ***Giron***,[1] including the one in this case. Co-counsel further indicated that as soon as Courts of Common Pleas elsewhere started granting these types of suppression motions, he started to file them. He also noted that there was no prejudice to the Commonwealth.

The prosecutor argued that the motion was clearly untimely and defense counsel did not offer any valid reason for filing the motion late. The prosecutor claimed that once ***Birchfield***[2] was decided in June of 2016, the motion could have been filed. Defense counsel was basically asking the court to "throw out the rule" that such motions are to be filed within 30 days of arraignment. Ultimately, the failure to timely file the motion is at best an ineffective assistance of counsel claim that should await post-conviction proceedings. Furthermore, even prior to ***Birchfield***, a defendant could challenge the voluntariness of his consent to search.

DISCUSSION

Rule 581(B), which governs the suppression of evidence, states:

> Unless the opportunity did not previously exist, or the interests of justice otherwise require, such motion shall be made only after a case has been returned to court and shall be contained in the omnibus pretrial motion set forth in Rule 578. If timely motion is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived.

[1] ***Commonwealth v. Giron***, 155 A.3d 635 (Pa. Super. 2017). This decision was filed on January 31, 2017.
[2] ***Birchfield v. North Dakota***, 136 S. Ct. 2160 (2016).

Pa. R. Crim. P. 581(B). The time limits for filing the omnibus pretrial motion are set forth in Rule 579, which states in relevant part:

> Except as otherwise provided in these rules, the omnibus pretrial motion for relief shall be filed and served within 30 days after arraignment, unless opportunity therefor did not exist, or the defendant or defense attorney was not aware of the grounds for the motion, or unless the time for filing has been extended by the court for cause shown.

Pa. R. Crim. P. 579(A).

Defendant's arraignment date was November 21, 2016. Therefore, unless Defendant can show that he falls within one of the exceptions, his motion to suppress should have been filed by December 21, 2016.

Defendant contends that his motion should be heard "in the interests of justice." Whether the interests of justice require an untimely omnibus pretrial motion or motion to suppress evidence be heard is a matter for the discretion of the trial judge. ***Commonwealth v. Hubbard***, 372 A.2d 687, 693 (Pa. 1977); ***Commonwealth v. Long***, 753 A.2d 272, 279 (Pa. Super. 2000). In making this decision, the judge should consider several factors, including: (1) the length and the cause of the delay; (2) the merits of the suppression claim; and (3) the court's ability, considering the complexity of the issues and the availability of the witnesses, to hold the hearing promptly. ***Commonwealth v. Brown***, 378 A.2d 1262, 1266 (Pa. Super. 1977). A trial judge should exercise discretion to hear an untimely motion where the merit of counsel's motion is so apparent that justice requires it to be heard. ***Hubbard***, *id*; ***Long,*** 753 A.2d at 280; ***Commonwealth v. Williams***, 323 A.2d 867, 866 (Pa. Super. 1974).

Length and Cause of the Delay

In this case, the motion to suppress was due on or before December 21, 2016, but was not filed until March 1, 2016. Thus, the length of the delay was 69 days.

The cause of the delay was counsel deciding to wait until after other trial courts ruled on similar motions that he and other defense attorneys had filed in other counties. The court finds that such is not a legitimate reason to delay filing an omnibus pretrial motion or a suppression motion. Once the decision was issued in ***Birchfield,*** defense counsel throughout the country had a reason to assert that the police should have obtained a warrant to obtain an individual's blood. Defense counsel did not have to wait for a published decision from the Pennsylvania Appellate Courts or decisions from other Pennsylvania trial courts. The only way to obtain such decisions is for someone to file a motion.

Defendant also acknowledged in his waiver of arraignment that he was aware of the time limits within which an omnibus pretrial motion must be filed.

Merits of the Suppression Motion

The merits of the suppression motion are not so apparent that the motion must be heard.

In addressing Defendant's arguments, it is evident to the court that Defendant argues in absolutes. First, Defendant argues that the standard for consent must be knowing, intelligent and voluntary. Second, Defendant argues that confusion and coercion are necessarily intertwined with every consent to a blood test in a DUI case. More specifically, Defendant argues that one is presumed to know the law; accordingly, one is presumed to

know that there are enhanced penalties under Pennsylvania's existing statute. Those penalties include criminal penalties. Next, Defendant argues that the present informed consent forms read by law enforcement do not inform defendants of the criminal penalties as required by Pennsylvania implied consent statute. Next, Defendant argues that he has a constitutional right to request a warrant and the fact that a law enforcement officer does not inform them of their right constitutes deliberate misinformation. Similarly, Defendant argues that the present state of the law causes confusion such that the police must inform the motorist that despite the enhanced penalties "on the books," they will not be applied.

Consent is a long recognized exception to the warrant requirement. While ***Birchfield*** may have changed the law in Pennsylvania regarding the enhanced penalties for refusing to submit to a blood test, ***Birchfield*** did not alter the standard for determining consent to search.

In the search and seizure context, the court must determine from the totality of the circumstances whether the consent was voluntary, i.e., "the product of an essentially free and unconstrained choice – not the result of duress or coercion, express or implied, or a will overborne." ***Commonwealth v. Smith***, 77 A.3d 562, 573 (Pa. 2013)(quoting ***Commonwealth v. Strickler***, 757 A.2d 884, 901 (Pa. 2000). The ***Smith*** Court further explained,

> The standard for measuring the scope of a person's consent is based on an objective evaluation of what a reasonable person would have understood by the exchange between the officer and the person who gave the consent. Such evaluation includes an objective examination of the maturity, sophistication and mental and emotional state of the defendant….

Id. (citations and quotation marks omitted).

Contrary to Defendant's assertions, the consent need not be knowing and intelligent. See ***Schneckloth v. Bustamonte***, 412 U.S. 218, 236-246 (1973); ***Commonwealth v. Cleckley***, 738 A.2d 427 (Pa. 1999)(rejecting the argument that, under Article I, §8 of the Pennsylvania Constitution, the test of 'voluntariness' should include as well a finding that the subject of the search knowingly and intelligently waived his or her right to refuse to consent, and finding that the greater privacy rights of the Pennsylvania Constitution are sufficiently protected where the federal standard of voluntariness has been met.).

Moreover, the Pennsylvania Supreme Court has eschewed per se rules and clearly held that no one fact or circumstance can be talismanic in the evaluation of the validity of a person's consent. ***Smith***, 77 A.3d at 572. As a result, the Pennsylvania Supreme Court has rejected arguments in support of per se rules that for consent to be valid an individual must be advised of his or her right to refuse or that the results of the test may be used against them in a criminal prosecution. ***Cleckley***, supra (right to refuse); ***Smith***, supra (results may be used in a criminal prosecution).

Defendant attempts to create a per se rule based on two factors – the failure of the police to explicitly advise Defendant that he had a right to refuse and the fact that increased penalties for refusal are "still on the books." The motion does not set forth any facts based on the actual exchange that took place between the police and Defendant or Defendant's maturity, sophistication, or mental or emotional state. The motion also does not set forth any facts or circumstances regarding Defendant's prior experience, if any, with the Pennsylvania statutes affected by the ***Birchfield*** decision.

In interpreting ***Birchfield***, the Pennsylvania Appellate Courts, however, have not held that a defendant has a constitutional right to refuse a warrantless blood test. Rather, they have found a statutory right to refuse. See ***Commonwealth v. Myers***, 2017 Pa. LEXIS 1689, *33 (July 19, 2017)(under 75 Pa.C.S. §1547(b)(1) there is an absolute right to refuse); ***Commonwealth v. Bell***, 2017 PA Super 236, 2017 Pa. Super. LEXIS 545, *13 (July 19, 2017)("The Supreme Court's decision in ***Birchfield*** did not provide that an individual has a constitutional right to refuse a warrantless blood test but stressed that there must be a **limit to the consequences** to which a motorist may be deemed to have consented by virtue of a decision to drive on public roads"). This court is obligated to abide by these decisions, regardless of its own personal beliefs regarding the existence and scope of an individual's right to refuse a request for a warrantless blood test.

The court also does not accept Defendant's argument that the police must advise a defendant of the consequences of refusal, including the increased criminal penalties, and then advise that the increased penalties cannot be applied because of recent court decisions.

First, the Pennsylvania Superior Court has held that the police provide partially inaccurate information when they provide a defendant with warnings that include the increased criminal penalties for refusing a blood test. ***Commonwealth v. Evans***, 153 A.3d 323, 331 (Pa. Super. 2016).

Second, the increased penalties are only invalid with respect to blood tests; they are not invalid with respect to breath tests. ***Commonwealth v. Giron***, 155 A.2d 635,

640 n.13 (Pa. Super. 2017)(citing ***Birchfield***, 136 S.Ct. at 2173-2174). Providing the warnings advocated by Defendant would create even more confusion to the average motorist than only advising him or her of the consequences of refusal which remain valid following ***Birchfield***. To have a single warning applicable to all cases, Defendant's argument would require the police to provide a motorist with a dissertation of the Pennsylvania DUI statutes and the Fourth Amendment. The average motorist would not understand why the police must get a warrant if he or she refuses a blood test but not if he or she refuses a breath test. In response, the motorist might attempt to choose or limit the test to a breath test, when he or she does not have the right or authority to do so. ***McCullough v. Dep't. of Transp.***, 551 A.2d 1170, 1172 (Pa. Commw. Ct. 1988)(a police officer with reasonable grounds to believe that a licensee was operating under the influence has unfettered discretion under Section 1547 to request the licensee to submit to a breath or blood test; the licensee does not have the option of choosing which test to take); see also ***Mooney v. Dep't. of Transp.***, 654 A.2d 47, 50 (Pa. Commw. Ct. 1994)(the courts have held that such unfettered discretion allows police officers, not licensees, to choose the type of chemical testing to be given to the licensee).

Finally, future motorists will argue that any mention of the now invalid increased penalties for refusal of a blood test will have coerced or tainted any consent given thereafter.

The Court's Ability to Hold a Hearing Promptly

Given the trial terms and the court's calendar, the court can typically hear a suppression motion within 60 days of the date it is filed, if there is not any unavailability or

scheduling issues by the parties or their witnesses. The court does not believe that the facts in this case are complex.

Conclusion

The motion was untimely by more than two months, and counsel did not have a valid reason for failing to file the motion in a timely manner. Since Pennsylvania case law has implicitly found that an individual does not have a constitutional right to refuse a request for a warrantless blood test and advising a motorist of the increased penalties for refusing such a test would be partially inaccurate and cause more confusion than the amended DL-26 form being utilized by the police, the court finds that the merits of Defendant's motion to suppress are not so apparent that the motion must be heard. Therefore, the court rejects Defendant's argument that his untimely motion to suppress must be heard in the interests of justice.

ORDER

AND NOW, this ___ day of August 2017, the court DENIES Defendant's motion to suppress without holding an evidentiary hearing. Defendant waived the right to challenge his consent to the blood test by failing to file his motion to suppress in a timely manner. The "interests of justice" do not otherwise require the court to address the merits of Defendant's motion.

By The Court,

____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)

Brian Manchester, Esquire
George Lepley, Esquire
Work File