IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-393-2017**
v.	:	**CR-421-2017**
	:	
MATTHEW H. GORDON,	:	**SUPPRESSION**
Defendant	:	

OPINION AND ORDER

Matthew Gordon (Defendant) filed a Motion to Suppress to the above captioned docket numbers on April 19, 2017. Hearing and argument were held on July 24, 2017. Defense Counsel argues that the Commonwealth's implied consent law as reduced to form in the DL26B does not comport with the Supreme Court's holding in Birchfield v. North Dakota (holding that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving).[1] The Court disagrees and finds that the DL26B does comport to the requirements of Birchfield; the evidence presented enables the Court to make the determination as required by Birchfield that Defendant's consent to a blood draw was indeed voluntary.

Background

In CR-393-2017, Defendant is charged with Driving Under the Influence of a Controlled Substance[2], an ungraded misdemeanor, and various summary offenses. The charges arise out of a one-vehicle accident that occurred in Lycoming County on November 13, 2016.

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[1] Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (2016).

[2] 75 Pa.C.S. 3802(d)(1)(iii). An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances: There is in the individual's blood any amount of a: metabolite of a substance under subparagraph (i) or (ii).

In CR-421-2017, Defendant is charged with Driving Under the Influence with the Highest Rate of Alcohol[3], second, a misdemeanor of the first degree, and Driving Under Influence of Alcohol or Controlled Substance[4], an ungraded misdemeanor. The charges arise out of a vehicle stop in Williamsport, PA, on December 4, 2016.

HEARING CR-393-2017 SUSPECTED DUI 11/13/2016

Testimony Trooper Troy Hansen

Trooper Troy Hansen (Hansen) of Troop F, Pennsylvania State Police, Montoursville testified on behalf of the Commonwealth. He has been employed with PSP for five years and was trained on detecting impaired drivers at the Academy. On November 13, 2016, he responded to a one vehicle crash on State Route 44 at approximately 10:20 pm. Hansen was in uniform and in a marked patrol vehicle. There was an ambulance on scene at the accident. Hansen observed an overturned vehicle that was later determined to be Defendant's vehicle and operated by Defendant at the time of the accident.

When talking with Defendant in the ambulance, Hansen detected the odor of alcohol and that Defendant's eyes were glassy and bloodshot. Defendant admitted that he had been drinking wine. Defendant did have a passenger with him. Defendant could not recall the details of the accident, however, neither Defendant nor his passenger were wearing safety belts. They had to crawl out of the vehicle and at that

[3] 75 Pa.C.S. § 3802(c). The highest tier, "highest rate of alcohol," prohibits driving a vehicle when one's BAC is 0.16% or above Commonwealth v. Myers, No. 7 EAP 2016, 2017 Pa. LEXIS 1689, at *16 (July 19, 2017).

[4] 75 Pa.C.S. § 3802(a)(1).

time called 911. Defendant refused medical treatment on the scene and the Emergency Medical Responders released Defendant from their care.

Hansen did not request Defendant perform field sobriety tests due to his concern about possibly aggravating any injuries caused by the accident. Hansen found that Defendant was able to understand his directions and would have placed Defendant under arrest because he believed that Defendant was incapable of safely operating a motor vehicle. The odor of alcohol upon Defendant's person, the details of the motor vehicle crash, Defendant's appearance, and Defendant's admission that he had been drinking wine all gave Hansen the probable cause to make the arrest.

After taking Defendant into custody, Hansen explained to him what would happen at the hospital regarding the blood draw. Defendant was in handcuffs on the ride to Williamsport Regional Medical Center (WRMC). Hansen denies threatening or yelling at the Defendant or attempting to coerce him in any way to submit to a chemical test of the blood. Hansen uncuffed Defendant at the hospital and advised that he could not speak to an attorney and read to him verbatim the DL-26B form. The Commonwealth submitted into evidence as Commonwealth's Exhibit 1 Defendant's signed DL-26B form from 12:30 am on November 14, 2016. Hansen did not tell Defendant that Birchfield requires that police obtain a probable cause search warrant prior to a blood draw but that he could dispense with the need for obtaining a warrant by consenting to a blood test. Hansen did not tell Defendant that he could waive the warrant requirement. Hansen did not tell Defendant that he had a right to refuse the test. He read to Defendant items 1. through 4. verbatim from the DL26B form:

It is my duty as a police officer to inform you of the following[5]:

1. You are under arrest for driving under the influence of alcohol or a controlled substance in violation of Section 3802 of the Vehicle Code.
2. I am requesting that you submit to a chemical test of blood.[6]
3. If you refuse to submit to the blood test, your operating privilege will be suspended for 12 months. If you previously refused a chemical test or were previously convicted of driving under the influence, you will be suspended for up to 18 months.[7]
4. You have no right to speak with an attorney or anyone else before deciding whether to submit to testing. If you request to peak with an attorney or anyone also after being provided these warnings or you remain silent when asked to submit to a blood test, you will have refused the test.

DL26B Chemical Test Warnings and Report of Refusal to Submit to a Blood Test as Authorized by Section 1547 of the Vehicle Code in Violation of Section 3802

The DL26B is the Pennsylvania Department of Transportation form to accompany Pennsylvania's Implied Consent Law 75 Pa.C.S. § 1547). Police officers use it as here to obtain driver's consent to a chemical test of their blood.

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[5] 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 the person will be subject to a restoration fee of up to $2,000; and

(ii) if the person refuses to submit to chemical breath 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).

75 Pa.C.S. § 1547 (Chemical testing to determine amount of alcohol or controlled substance.)

[6] Birchfield, Bernard and Beylund were told that they were required to submit to a search after being placed under arrest for drunk driving. Birchfield v. North Dakota, 136 S. Ct. 2160, 2174 (2016). In Pennsylvania, officers' request that drivers arrested for suspected driving under the influence to submit to the chemical testing.

[7] References to criminal consequences for refusal have been removed from the DL26 form after the Birchfield decision. As both DUIs in the instant matter where after Birchfield, Defendant was read and ultimately signed the revised DL26 form (the DL26B).

After the blood was drawn, Hansen provided Defendant with Miranda[8] warnings and asked Defendant if there were anything else in his system that would impair his ability to drive. In response, Defendant told Hansen that he had smoked marijuana at Cherry Springs State Park at approximately 9 pm that evening. He was headed back home at the time of the vehicle accident. Defendant had not had anything to eat since noon that day and he had his last drink at 6:30 pm. Defendant denied being on any other medication or having any other illness or disability and had no difficulty answering Hansen's questions. Defendant's initial Blood Alcohol Concentration tested at 0.018 (below the limit of Pennsylvania's Tier I DUI Section 3802(a)(2)). Additional testing of the blood for marijuana was added based upon Defendant's statement and Defendant's blood did test positive for marijuana.

Testimony of Cheyanne Taylor, Phlebotomist

Cheyanne Taylor, a phlebotomist from WRMC testified on behalf of the Commonwealth. She had been performing blood draws at WRMC since May of 2016 and continued to be employed in that capacity on the day of her testimony. She was able to identify the Defendant in the courtroom and denied using force, yells, or threats to get Defendant to submit to blood draw. She testified that Defendant was able to follow directions and appeared to understand what was going on. She estimated she spent about ten (10) minutes in Defendant's presence and in that time she did not form an opinion on whether Defendant was impaired.

[8] Miranda v. Arizona, 384 U.S. 436 (1966).

HEARING CR-421-2017 SUSPECTED DUI 12/4/2016

Testimony of Officer Clinton Gardner

Officer Clinton Gardner (Gardner) of the Williamsport Bureau of Police testified on behalf of the Commonwealth. He is certified in field sobriety testing. On the date of his testimony he had been working as an officer for one year and eight months. He testified that he has made less than 50 stops for suspected DUI. He was able to identify Defendant in the courtroom.

On December 4, 2016, Gardner was on duty in the West End of Williamsport. While traveling west on Edwin Street he observed a silver sedan with an extinguished front headlight. He initiated a traffic stop on Rural Avenue just east of 1st Avenue. When contacting Defendant, Gardner detected the odor of alcohol. Gardner testified that Defendant's eyes were glassy and his speech was slurred. He asked Defendant whether he had had any alcoholic beverages to which Defendant replied "several". Defendant was able to provide Gardner with the appropriate vehicle documents and did not have trouble retrieving them.

Gardner asked Defendant to submit to field sobriety tests and Defendant agreed. Defendant was able to step out of the vehicle. Gardner had to repeat field sobriety test instructions to Defendant. Gardner testified that Defendant did not complete the walk and turn test to satisfaction. Defendant attempted the one leg stand and failed. Gardner stopped the testing at this point as he was concerned Defendant would fall and be injured.

Gardner informed Defendant that he was under arrest for suspected Driving Under the Influence. He was taken to the WRMC and Gardner read the DL-26B form

to him, which informed Defendant that his driver's license would be suspended if he refused a blood draw and that he had no right to consult with an attorney. Commonwealth's Exhibit 1, DL26B.

Gardner did not tell Defendant that Birchfield requires that police obtain a probable cause search warrant for a blood draw but that Defendant could dispense with the need for a search warrant by consenting to a blood draw. It was Gardner's opinion that Defendant understood what he was doing when he consented to the blood draw and that Defendant voluntarily gave blood.

Testimony of Cherie Pittinger*, *Phlebotomist

Cherie Pittinger was the phlebotomist on duty at the time of Defendant's blood draw. She has been employed at WRMC for 10 years and performs blood draws on DUI arrestees regularly in her course employment. She was able to identify Defendant in the courtroom and confirmed that she drew his blood on December 4, 2016, She testified that she was unable to form an opinion regarding whether Defendant appeared to be under the influence of alcohol during the blood draw.

Discussion

ISSUES RAISED IN CR-393-2017 SUPPRESSION MOTION

Whether the blood seized from Defendant was seized in violation of his rights under Article 1 Section 8 of the Pennsylvania Constitution and under the Fourth Amendment to the United States Constitution.

> The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but open probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourth Amendment, United States Constitution.

> The people shall be secure in their persons, houses, papers and possession from unreasonable searches and seizures, and no warrant to search any place or to seize any person of things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed by the affiant.

Article I Section 8 Constitution of the Commonwealth of Pennsylvania (security from searches and seizures).

Any search conducted without a warrant is deemed to be *per se* unreasonable under the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. Commonwealth v. Cleckley, 738 A.2d 427, 429 (Pa. 1999) (citing Commonwealth v. Williams, 692 A.2d 1031 (Pa. 1997)). Therefore, the search of Defendant's blood was unreasonable unless an exception to the requirement that police obtain a warrant exists. Certain specifically established exceptions, one of which is valid consent may, however, render an otherwise illegal search permissible. Id.

> In determining the validity of a given consent, the Commonwealth bears the burden of establishing that a consent is the product of an essentially free and unconstrained choice — not the result of duress or coercion, express or implied, or a will overborne — under the totality of the circumstances. 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 or emotional state of the defendant. Gauging the scope of a defendant's consent is an inherent and necessary part of the process of determining, on the totality of the circumstances presented, whether the consent is objectively valid, or instead the product of coercion, deceit, or misrepresentation.

Commonwealth v. Evans, 153 A.3d 323, 328 (citing Commonwealth v. Smith, 77 A.3d 562, 573 (Pa. 2013) (internal citations, quotations, and corrections omitted).

Considering the totality of the circumstances, the Court finds that Hansen did not use deceit, misrepresentation, or coercion in seeking Defendant's consent for the blood draw and testing, thus not invalidating the blood draw or those results from those bases. Also the form that Hansen read to Defendant and both parties signed did not mention criminal penalties for refusal that the Supreme Court of the United States found to be unconstitutional in Birchfield and therefore vitiating voluntary consent.

Defendant was under arrest at the time he consented. He had been transported via police vehicle and in handcuffs to WRMC for the express purpose of a blood draw. The DL26B he signed told him that the arresting officer was asking him to submit to the blood test. He was told the civil consequences of his refusal. He was not told that the evidence collected from his blood would be admissible against him in any subsequent criminal proceedings and depending on the results of the blood test the criminal penalty could change. He was told that he had not right to speak to a lawyer.

Defendant was not unresponsive at the scene or rendered unconscious at the hospital, as in Commonwealth v. March, 154 A.3d 803 (Pa. Super 2016) and Commonwealth v. Myers, 164 A.3d 1162 (Pa. 2017) respectively. It seems to the Court that Defendant voluntarily signed the DL26B form and that the Defendant was not coerced into signing the form by the threat of civil penalties alone. There were no references to enhanced criminal penalties on the form so those as in Commonwealth v. Evans, 153 A.3d 323 (Pa. 2016) that could have coerced him. The Commonwealth Court has already found that the civil penalties for refusal remain the law of Pennsylvania, Regula v. Commonwealth, 146 A.3d 836 (Pa. Comm. Ct. 2016), so Hansen correctly advised Defendant of the civil consequence of his refusal if not the

potential criminal consequences of consenting. But the law does not require that Defendant be made aware of all the consequences of his consent.

Defendant was conscious when he consented to have his blood drawn. Hansen told Defendant that he was requesting that he submit to the blood draw. Drivers are told that if they refuse, that their driver's license will be suspended, and if it not the first DUI then the suspension could be up to 18 months. The offending language referencing the increased criminal penalties for refusal if later found guilty of a DUI have been removed from the form and in fact drivers who refuse are not punished criminally for their refusal in a post Birchfield legal environment.

Whether Defendant was so under the influence of a controlled substance that he could not have voluntarily consented to blood draw.

> Voluntariness "must be shown by a preponderance of the credible evidence." In order to meet this burden, "the Commonwealth must demonstrate that the proper warnings were given, and that the accused manifested an understanding of these warnings."

Commonwealth v. Eichinger, 915 A.2d 1122, 1136 (Pa. 2007) (jnternal citations ommitted).

The Court finds Hansen and the phlebotomist credible in their testimony. Through Hansen's testimony, the Court finds that Defendant was walking and talking after his vehicle accident. Defendant was able to decline further medical treatment by emergency medical personnel. Hansen made the decision not to conduct sobriety tests in the field because there could have been latent injuries that Defendant was not aware of that may have made physical movement unsafe. Defendant was able to respond to Hansen's questions and sign the DL26B form. Hansen did not testify to any slurring of language, inability to understand or communicate, or any other indicators to the Court that Defendant was not in a state to consent to a blood test. The

phlebotomist also testified that the Defendant cooperated with her in obtaining the blood specimen. Obtaining the specimen required that the Defendant follow the phlebotomist's verbal directions and be able to sit up and hold his arm still for the entirety of the draw. Hearing no evidence to the contrary, the Court finds that Defendant was not so under the influence of a controlled substance that he could not voluntarily consent to a blood draw.

Whether the officer's advisement that Defendant had no right to speak to attorney before assenting to blood draw vitiated his knowing intelligent and voluntary consent.

There is no requirement that the consent to the blood draw be knowing voluntary and intelligent. The consent to the blood draw must be voluntarily only. Voluntariness of consent to a search must be "determined from the totality of all the circumstances," Birchfield at 2186 (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973) "Because voluntariness of consent to a search must be "determined from the totality of all the circumstances," Schneckloth,*supra*, at 227, we leave it to the state court on remand to reevaluate [Petitioner Beylund's] consent given the partial inaccuracy of the officer's advisory.

Moreover, in Pennsylvania, drivers have no right to speak to an attorney before making the decision as to whether to consent to a chemical test of their blood. In fact, it is the law in Pennsylvania that Drivers must be advised that they have no right to speak to an attorney if the Court is to consider the driver's refusal to be knowing. Commonwealth v. O'Connell, 555 A.2d 873 (1989) (held that drivers refusal to consent to blood test was unknowing because he did not know that he had no right to consult with an attorney).

Whether Defendant had to be advised of his constitutional right to refuse a blood test unless a warrant was first obtained.

Based on the reasoning of Schneckloth v. Bustamonte, the Supreme Court of the Untied States re-adoption of that standard in Birchfield v. North Dakota, and Commonwealth v. Cleckley, 738 A.2d 427, 433 (Pa. 1999) making the Schneckloth v. Bustamonte federal standard the Pennsylvania standard as well for tests of voluntariness to consent to a search, the Court finds that Defendant did not have to be advised that he had a constitutional right to refuse the blood test (if he indeed had that constitutional right which this Court does not hold, *infra*). He did have a statutory right to refuse: "Subsection 1547(b)(1) confers upon all individuals under arrest for DUI an explicit statutory right to refuse chemical testing, the invocation of which triggers specified consequences." Commonwealth v. Myers, No. 7 EAP 2016, 2017 Pa. LEXIS 1689, at *18 (July 19, 2017).

The Court finds the DL26B form did, through implication, advise Defendant of his statutory to refuse. It states the police officer is requesting the test, and that if he should refuse the test, the civil consequences:

> I am requesting that you submit to a chemical test of blood. If you refuse to submit to the blood test, your operating privilege will be suspended for 12 months. If you previously refused a chemical test or were previously convicted of driving under the influence, you will be suspended for up to 18 months.

Refusal was presented as an option and until advised otherwise by the appellate courts[9] this Court finds that the DL26B form currently in use encompasses the statutory to right to refuse.

[9] Myers found a statutory right to refuse, it went on to address the constitutional issues raised in Birchfield and stated:

ISSUES RAISED IN CR-421-2017 SUPPRESSION MOTION

Whether Defendant had a constitutional right to refuse testing of blood unless the police first obtained a search warrant.

The Superior Court of Pennsylvania recently held that Defendant does not have a constitutional right to refuse a warrantless blood draw (Commonwealth v. Bell, 2017 PA Super 236 (Pa. Super. Jul 19, 2017, petition for reargument pending as of 9/15/2017)) so this Court is constrained to hold the same. The Court can say that Defendant had a statutory right to refuse testing of blood unless the police first obtained a search warrant based on Myers (decision issued same day as Bell).

Whether the Defendant had to be advised of his constitutional right to refuse a blood test unless a warrant was first obtained.

The Defendant did not have to be advised that he had a right to refuse the blood test unless a warrant was first obtained. In Cleckley, the Supreme Court of Pennsylvania specifically adopted the Scheckloth[10] voluntariness standard to determine whether consent was voluntarily given. Cleckly held that that while the Pennsylvania Constitution provides greater privacy rights than the Fourth Amendment

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> In a future case, Birchfield may impact the constitutional validity of certain provisions of Pennsylvania's implied consent scheme. But the instant case presents no facial constitutional challenge to any statutory provision. Accordingly, we do not today consider the effect of the Birchfield decision upon our statutes. Rather, we consider Birchfield only as it relates to our conclusion that, in the absence of actual, voluntary consent, statutorily implied consent does not dispense with the need for police to obtain a warrant before conducting a chemical test of a DUI arrestee's blood. Myers at 41.

[10] Voluntariness of consent to a search must be "determined from the totality of all the circumstances," *Schneckloth*, supra, at 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854, we leave it to the state court on remand to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory. Birchfield at 2186.

in certain respects, regarding the test for determining whether consent was freely and voluntarily given, those privacy rights are sufficiently protected where the federal standard of "voluntariness" has been met. Cleckley at 433.

The determination of whether consent was voluntarily given is a factual determination for the Court to make after evaluating the totality of the circumstances. Though the Defendant knowing he had a statutory right to refuse is a factor to be considered in determining whether consent was voluntary, it is not a dispositive one, even if the defendant is in custody at the time that police officers ask to search.

> It is important to remember that even under the federal standard, one's knowledge of his or her right to refuse consent remains a factor to consider in determining the validity of consent; it simply is not a determinative factor since other evidence is oftentimes adequate to prove the voluntariness of a consent.

Cleckly at 433.

Defendant's consent to the blood draw did not have to be knowing, intelligent and voluntary. His consent only had to be voluntary. In the circumstances of CR-421-2017, we have a Defendant being arrested for suspected DUI for the second time in three weeks. He admits to the officer that he has been drinking. He does not perform field sobriety tests satisfactorily. He is in custody and handcuffed on the way to the hospital but the Court does not find that custody to be so coercive as to vitiate the Defendant's ability to understand the DL26B form.

The form itself, the Court believes comports with the law as announced in Birchfield. Any reference to criminal penalties for refusing to test have been removed from the form. Though the full ramifications of the consenting are not explained to Defendant, according to Schneckloth v. Bustamonte, they do not have to be.

Schneckloth at 236. When Defendant is waiving his right to be free from searches and seizures by the government, it is not equivalent to waiving a trial right, thus implicating the knowing and intelligent portion of Miranda warnings. Id. Put simply, waiving a fourth amendment right is not the equivalent to waving a fifth amendment right. A Miranda-type warning (i.e. you have a right to refuse a search without a warrant") is not a prerequisite to a valid waiver of the Fourth Amendment protection against unreasonable searches, but knowledge of the right to refuse is a factor on the issue of whether the consent was valid. Where the defendant was in custody at the time that the "consent" was obtained, the courts apply heightened scrutiny in determining the voluntariness of the consent. Applying this heightened scrutiny, and hearing the testimony of the arresting officer and the phlebotomist, the Court does not believe the Defendant was coerced into consenting to the blood draw.

ORDER

AND NOW, this 26th day of September, 2017, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Motion to Suppress in the above captioned docket numbers is hereby DENIED.

BY THE COURT,

Nancy L. Butts, P.J.

cc: Peter Campana, Esq.
Nicole Ippolito, Esq.
Gary Weber, Esq.