IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-1933-2016**
v.	:	
	:	
CLIFFORD LIBERTI,	:	**SUPPRESSION**
Defendant	:	

OPINION AND ORDER

On December 29, 2016, the Defendant filed a Motion to Suppress Evidence. A hearing on the motion was held February 2, 2017. Robert Hoffa, Esq. of Campana, Hoffa, Morrone, and Lovecchio, P.C. appeared on behalf of Clifford Liberti (Defendant).

Background

Defendant is charged by criminal information filed November 18, 2016, with Possession of Drug Paraphernalia[1], Driving Under the Influence of Alcohol of Controlled Substance[2], and Driving Under the Influence with Highest Rate of Alcohol[3]. The charges arise out of an incident that occurred on July 14, 2016, in Williamsport, Pennsylvania.

Testimony of Pennsylvania State Trooper Adam Kirk

Kirk testified to his training and his 10-year experience as a PSP trooper. He is ARIDE trained and a field sobriety instructor. Kirk is also a Drug Recognition Expert (DRE). In his ten-year career, he believes he has arrested 312 individuals for suspected driving under the influence.

---

[1] 35 P.S. § 780-113(a)(32).
[2] 75 Pa.C.S. § 3802(a)(1).
[3] 75 Pa.C.S. § 3802(c).

Kirk testified that early in the morning of July 14, 2016, he was traveling westbound on West Fourth Street in Williamsport, PA, and observed a black SUV. Kirk observed that the vehicle was "bouncing" along the fog line. He activated his motor vehicle recording (MVR) system or fixed video recording device. Kirk testified that the camera in his patrol vehicle is always operating and when he wants it to record it will begin to record from just prior to his turning it on. The Court viewed the MVR at the suppression hearing.

Kirk observed the black SUV make a wide right turn onto Woodward Street, crossing into the oncoming lane. Kirk activated his lights and pulled Defendant over. He patted the Defendant down and found a pipe in the left pocket of his cargo shorts. Kirk proceeded to conduct field sobriety tests, which Defendant refused. Kirk informed Defendant that he was placing him under arrest for suspected Driving Under the Influence. Kirk testified that he had no concern for the Defendant's medical condition at the time of the arrest. Defendant did not provide testimony.

Kirk transported Defendant to the Williamsport Regional Medical Center where he read him the DL-26B Pennsylvania Department of Transportation Form: 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.[4] The Commonwealth

[4] The DL-26 Form was revised in June of 2016 after the United States Supreme Court decision in Birchfield v. North Dakota holding that drivers could not deemed to have consented to a blood test under criminal penalty for refusing such a test. The new DL-26 struck reference to enhanced criminal penalties for refusal if drivers were later found to be guilty of driving under the influence. Post-Birchfield, Warning #3 reads:

"If you refuse to submit to the chemical test your operating privilege will be suspended for at least 12 months. If you previously refused a chemical test or were previously convicted of driving under the influence, you will be suspended for 18 months."

submitted as Exhibit 1 the Defendant's signed DL26B form. The Commonwealth submitted as Exhibit 2 the MVR recording.

Discussion

Whether stop of Defendant's vehicle occurred without probable cause

Kirk observed Defendant crossing the fog line on more than occasion. Motor vehicles drivers are required to operate their vehicles "as nearly as practicable within a single lane". 75 PA.C.S. § 3309 (DRIVING ON ROADWAYS LANED FOR TRAFFIC). Moreover, after following Defendant, Kirk observed Defendant take a wide right turn at the Woodward Street exit, crossing into the opposite lane of traffic. Motor vehicle drivers must drive on the right side of the roadway. 75 PA.C.S. § 3301 (DRIVING ON RIGHT SIDE OF ROADWAY).

Kirk made more than one observation that would indicate that Defendant was not operating his vehicle in a safe manner. Direct observation of motor vehicle code violations provided Kirk with the probable cause necessary to initiate a motor vehicle stop. *See* Commonwealth v. Feczko, 10 A.3d 1285, 1291 (Pa. Super. 2010) (holding stops for motor vehicle violations require probable cause whereas stops for investigatory purposes require reasonable suspicion of criminal activity). In Feczko the Superior Court affirmed the trial courts denial of a suppression motion. As in the

---

The updated DL26, now the DL26B, removed the following crossed out language:
~~In addition, if you refuse to submit to the chemical test, and you are convicted of violating section 3802(a)(1) (relating to impaired driving) of the vehicle code, then, because of your refusal, you will be subject to more severe penalties set for in section 3804(C) (relating to penalties) of the vehicle code. These are the same penalties that would be imposed if you were convicted of driving with the highest rate of alcohol, which include a minimum of 72 consecutive hours in jail and a minimum fine of $1,000.00, up to a maximum of five years in jail and a maximum fine of $10,000.~~

case at bar, the suppression court in Feczko viewed a video recording from the trooper's patrol car, observed numerous contacts with the white fog line by defendant's vehicle, and clearly saw the vehicle crossing over the center yellow line while negotiating a curve. Finding the underlying factual scenario here to be analogous to that of Feczko, the Court finds that Kirk stopped Defendant's vehicle with the required probable cause.

Whether blood seized from Defendant's person 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.

Birchfield v. North Dakota[5] held that warrantless breath tests to prevent the destruction of BAC evidence are constitutional searches incident to arrest, but warrantless blood tests are not. The Supreme Court found that breath tests were a reliable method of determining blood alcohol concentration. Because blood tests are significantly more invasive than breath tests, the Supreme Court judged their use in light of the availability of the less invasive alternative of a breath test. Though the Supreme Court referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, "it is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads. BIRCHFIELD V. NORTH DAKOTA, 136 S. CT. 2160, 2185, 195 L.ED.2D 560, 589 (2016).

[5] 136 S. Ct. 2160, 2197, 195 L.Ed.2d 560, 602 (2016).

Birchfield comprised three different petitioners with three different factual scenarios. Petitioner Birchfield was criminally prosecuted for refusing a warrantless blood draw, and the search he refused could not be justified as a search incident to arrest or based on implied consent. Petitioner Bernard, on the other hand, was criminally prosecuted for refusing a warrantless breath test. The warrantless breath test was a permissible search incident to Bernard's arrest for drunk driving, an arrest whose legality Bernard had not contested. The Fourth Amendment does not require officers to obtain a warrant prior to demanding the breath test, and Bernard had no right to refuse it.

Unlike the other two Birchfield petitioners, the third Birchfield petitioner was not prosecuted for refusing a test. Petitioner Beylund submitted to a blood test after police told him that the law required his submission. Beylund's license was then suspended and he was fined in an administrative proceeding. The Supreme Court of the United States found that the North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could permissibly compel both blood and breath tests. The Supreme Court remanded the case of Beylund where he only faced civil penalties for his refusal to consent to determine whether Beylund's consent was knowing voluntary and intelligent.[6] On remand the North Dakota

---

[6] 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.

If the court on remand finds that Beylund did not voluntarily consent, it will have to address whether the evidence obtained in the search must be suppressed when the search was carried out pursuant to a state statute, see Heien v. North Carolina, 574 U. S. ___, ___-___, 135 S. Ct. 530; 190 L. Ed. 2d 475 (2014) , and the evidence is

Supreme Court "assume[d] the drivers' consent to the warrantless blood tests was involuntary and conclude[d] the exclusionary rule does not require suppression of the results of the warrantless blood tests in the license suspension proceedings."[7] The North Dakota Supreme Court did not analyze the "totality of the circumstances" as the Supreme Court of the United States directed it to, so its analysis on remand provides little guidance to this Court on deciding the current motion.

Turning to guidance from the Pennsylvania appellate courts in a post-Birchfield legal environment, the Superior Court and the Commonwealth Court have held the following regarding DUI refusal in Pennsylvania in light of Birchfield:

In Commowealth v. Evans, 153 A.3d 323 (Pa. Super. 2016) (decided December 20, 2016) the Superior Court reversed the denial of a suppression in a DUI case where the driver had consented to the chemical test of his blood. The driver argued that his consent was not voluntary and that he was coerced into an involuntary blood test based upon the officer's warnings (i.e. the increased criminal penalty for refusal if later found guilty of a violation of 3802(a), incapable of safe driving). The driver argued that the taking of his blood violated his right to be free from unreasonable searches pursuant to both Article 1 Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution. The Superior Court reversed the denial of the suppression of the BAC results in accordance with Birchfield. Id. at 331.

---

offered in an administrative rather than criminal proceeding, see Pennsylvania Bd. of Probation and Parole v. Scott, 524 U. S. 357, 363-364, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998). And as Beylund notes, remedies may be available to him under state law.

[7] Beylund v. Levi, 889 NW.2d 907 (N.D. 2017 on remand from United States Supreme Court).

In Commonwealth v. March, 2017 Pa. Super. LEXIS 46, 154 A.3d 803 (Pa. Super 2016) (decided January 26, 2017), the Superior Court held that an unconscious defendant had no right to refuse to consent to a search of his blood. The Superior Court made no mention of Birchfield in its decision. In March, the Defendant was not under arrest for suspected DUI at the time of the chemical search of his blood, rather he was found unresponsive as the driver at a single vehicle accident. His blood was tested for drugs and alcohol at the hospital as the responding officer saw "five blue wax paper bags and a bottom of a cut off prescription bottle on the floor of the vehicle" another officer saw a hypodermic needle on the floor of the vehicle. As these plain view items were indicative of heroin use, the officer had probable cause to request a test of the blood for drugs and alcohol at the hospital. The trial court suppressed the BAC results relying on the Superior Court decision in Myers[8] that found that reading the implied consent form to an unconscious defendant violated the holding in Missouri v. McNeely 133 S.Ct. 1552, (2013).[9]

The Superior Court distinguished Myers and McNeely in March holding that as Defendant was found unconscious at the scene of the motor vehicle accident he had no right to refuse a chemical test of his in blood. In March, the defendant had no opportunity to refuse, as he was unconscious. The Superior Court held that in Pennsylvania unconscious persons do not have a right to refuse chemical testing. The

[8] Commonwealth v. Myers, 118 A.3d 1122 (Pa. Super. 2015).

[9] In McNeely, the defendant refused a blood draw and the hospital personnel drew the blood over his objection. The Supreme Court held that the dissipation of alcohol in the blood does not constitute a valid *per se* exigency to justify a warrantless blood test [9] McNeely did not involve a motor vehicle accident, rather after refusing a breathalyzer test in the field, he was arrested and brought to the hospital. He refused the chemical test of his blood and he was tested despite his refusal.

Superior Court distinguished Myers, factually, as the case did not involve a motor vehicle accident, the defendant was conscious when arrested and the police waited until defendant was rendered unconscious by hospital administration of medication to seek chemical testing. The defendant in Myers retained the protection of the implied consent law and the right to refuse testing under these circumstances. Police could not wait until a defendant was reduced to unconsciousness by medication to invoke Section 3755 and claim exigent circumstances. March at 11.

In Commonwealth v. Giron, 2017 Pa. Super. LEXIS 60 (decided January 31, 2017) the Superior Court held that pursuant to Birchfield, a defendant who refuses to provide a blood sample when requested by police is not subject to enhanced penalties provided in 75 Pa C.S. Sections 3803 and 3804. As the defendant in Giron was subjected to enhanced penalties provided by sections 3803 and 3804 for refusing to provide a blood sample, his sentence was illegal and although his convictions were affirmed, his sentenced was vacated and remanded for re-sentencing. The Superior Court raised the issue of the illegal sentence *sua sponte*.

In Regula v. Commonwealth, 146 A.3d 836 (decided September 6, 2016), the Commonwealth Court held that it is of no moment that the arrest of Defendant for the underlying DUI was found to be illegal. The evidence of his refusal to submit to a chemical testing of his blood is admissible in the civil proceeding resulting in 12 month license suspension. Citing the Supreme Court in Birchfield[10], Birchfield's reach does not extend to civil penalties for refusal in Pennsylvania. The decision of the

[10] "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…Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them" (Birchfield at 589)

Commonwealth Court is in accordance with the North Dakota Supreme Court in Beylund *supra,* which allows the civil penalties related to refusal to remain in place.

Having reviewed the appellate courts interpretation of Birchfield, the Court lastly notes the approach of the District Attorney's office of Lycoming County and the Pennsylvania Department of Transportation post-Birchfield. Officers in Lycoming County are advised to seek chemical tests of the blood for drivers whom they have arrested for suspected driving under the influence. The Pennsylvania Department of Transportation has revised the DL-26 form to the DL-26B. SEE FN 4. The District Attorney Association and Penn DoT believe that the removal of reference to enhanced criminal penalties for refusal from the form solves the Birchfield problem. The policy in Lycoming County is to take chemical tests of the blood pursuant to a signed DL-26B rather than perform breathalyzer tests or acquire a warrant before a chemical test of the blood.

Whether Defendant's alleged consent to the blood draw was knowing voluntary and intelligent, given that he was supposedly under the influence of alcohol and that he was told by Kirk that if he did not consent to the blood test that his driving privilege would be suspended for at least one year, and that he no right to speak to an attorney or anyone else before deciding whether or not to submit to the blood test.

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.[11]

Objectively, considering the totality of the circumstances, the Court finds that Kirk 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. Defendant was not injured in an accident or unconscious at the scene, as in March. As for the argument that Defendant was too inebriated to consent, the Court finds that argument lacking for the express reason that Kirk testified that he had no concern for Defendant's medical condition and that Defendant refused field sobriety tests. It seems to the Court that Defendant knowingly and voluntarily signed the DL26B form. 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 Evans could not have coerced him. The Commonwealth Court has already found that the civil penalties for refusal remain the law of Pennsylvania, see Regula, so Kirk correctly advised Defendant of the consequence of his refusal. Moreover, the Court finds that as Defendant had the ability to refuse field sobriety tests and finding no intervening facts that would render that ability to refuse unemployable, it finds that Defendant's consent to the blood test was knowing, voluntary and intelligent.

[11] Commonwealth v. Evans, 153 A.3d 323, 328 citing Commonwealth v. Smith, 621 Pa. 218, 77 A.3d 562, 573 (Pa. 2013) (internal citations, quotations, and corrections omitted).

ORDER

AND NOW, this 9th day of May, 2017, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Motion to Suppress is hereby DENIED.

BY THE COURT,

Nancy L. Butts, P.J.

cc: Peter Campana, Esq.
Scott Werner, Esq.
Gary Weber, Esq. Lycoming Law Reporter
S. Roinick, file