

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

<b>ANTHONY MARCHESE,</b>	:	
	:	
	:	
<b>vs.</b>	:	<b>NO. 16-00157</b>
<b>COMMONWEALTH OF PA</b>	:	<b>1996 CD 2016</b>
<b>DEPARTMENT OF TRANSPORTATION</b>	:	
<b>Defendant</b>	:	<b>1925(a) OPINION</b>

**Date:           JANUARY 24, 2017**

**OPINION IN SUPPORT OF THE ORDER OF NOVEMBER 10, 2016, IN COMPLIANCE  
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

**I. PROCEDURAL HISTORY**

Anthony Marchese, (hereinafter “Appellant”) has appealed this Court’s November 10, 2016, Order dismissing his appeal from an 18-month suspension of his operating privilege for having refused a chemical blood test following an arrest for suspected DUI by a Pennsylvania State Police Trooper. On December 7, 2016, Appellant filed a Notice of Appeal of the Order dated November 10, 2016. Appellant filed a Concise Statement of Matters Complained of on Appeal on December 29, 2016. This Opinion is submitted in regard to the pending appeal.

In Appellant’s Concise Statement of Matters Complained of on Appeal, filed December 29, 2016, Appellant raised the following issue:

1. Whether Pennsylvania’s Implied Consent Law is violative of Article 1 Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution under the recent decision of the United States Supreme Court in the case of Birchfield v. North Dakota, 136 S.Ct. 2160 (2016). In that case, the Court held that the states are precluded from penalizing a person charged with DUI for having refused to submit a sample of blood for testing without a search warrant. In the case at bar, Plaintiff refused to submit (sic) a sample of his blood for testing without a search warrant. Therefore, Plaintiff submits that the Court

should set aside the suspension of his operating privileges because of the Unconstitutional Conditions Doctrine.

2. Plaintiff will argue on appeal that Pennsylvania's Implied Consent Law also violates the due process clauses of the Fourteenth Amendment to the United States Constitution. See State v. Trahan, 870 NW2d 396 (Minn. Ct. App. 2015). In that case the Court held that Minnesota's test refusal statute was violative of due process because it fails the strict scrutiny test. In the case at bar, the Defendant had a constitutional right to refuse a blood test. Because the Pennsylvania Statute also fails the strict scrutiny test as did Minnesota's, the suspension should be set aside.

Appellant's appeal should be denied and the Court's Order affirmed.

## **II. FACTS**

On November 29, 2015, Appellant, 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. By letter mailed January 12, 2016, Appellant was notified by the

Department of Transportation that his license would be suspended for a period of 18 months, effective February 16, 2016. A timely appeal of the suspension was filed on February 3, 2016. A hearing on the appeal was held on August 23, 2016, after which counsel for the Appellant and the Commonwealth were permitted to submit briefs. On November 10, 2016, this Court issued an Order dismissing the appeal of the 18 month suspension of Appellant's operating privilege resulting from the violation of 75 Pa.C.S. §1547.

## **II. DISCUSSION**

In the review of a license suspension case, the analysis is whether the factual findings of the trial court are supported by the evidence presented and whether there was an error of law or abuse of discretion committed by the trial court. ***Sitoski v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing***, 11 A.3d 12, 17 n.5 (Pa. Commw. Ct. 2010) (quoting ***Nornhold v. Department of Transportation, Bureau of Driver Licensing***, 881 A.2d 59, 62 n.4 (Pa. Commw. Ct. 2005)).

Appellant first contends that "Pennsylvania's Implied Consent Law is violative of Article I Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution under the recent decision of the United States Supreme Court in the case of ***Birchfield v. North Dakota***, 136 S.Ct. 2160 (2016)." This Court, in its Opinion and Order dated November 10, 2016, addressed why the ***Birchfield*** case is distinguishable from the present case. Unlike the warnings that were given in North Dakota, which were the subject of the ***Birchfield*** decision, Pennsylvania's DL-26 form does not criminalize the refusal of an officer's request for a blood draw. "License

suspensions are collateral civil consequences rather than criminal penalties.”

**Commonwealth v. Duffey**, 639 A.2d 1174, 1176 (Pa. 1994). Appellant has argued that the Implied Consent Law imposes a requirement upon an operator that he surrender his constitutional right to be free from an unreasonable search and seizure in order to operate a motor vehicle on the highways of Pennsylvania, and therefore the Implied Consent law is unconstitutional because it imposes an unconstitutional condition. We disagree. Operating a motor vehicle upon a Commonwealth highway is not a property right but a 'privilege.' **Krall v. DOT**, 682 A.2d 63, 65 (Pa. Commw. Ct. 1996). An operator of a motor vehicle has the right to refuse to submit to a blood test without a search warrant, but the automatic suspension of the operating privilege is a civil, not criminal, consequence that results from said refusal. As stated by the United States Supreme Court, “[o]ur 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. Appellant suffered no criminal consequences from his refusal to submit to a warrantless blood test. Therefore, the **Birchfield** decision does not apply to a civil appeal of suspension of operating privileges

Appellant, in his Concise Statement, also raises the issue that Pennsylvania’s Implied Consent Law “also violates the due process clauses of the Fourteenth Amendment to the United States Constitution and Article 1 Section 9 of the Pennsylvania Constitution.” This issue was neither raised in Appellant’s initial appeal of his suspension, nor was it addressed at the hearing on August 23, 2016. In fact, after

the parties were given the opportunity to present argument, Appellant's counsel indicated that he would submit a brief as opposed to making argument. The Court specifically asked "[o]kay, the only issue this boils down to is how Birchfield may or may not affect this case," to which counsel for the Appellant replied "[r]ight, that's correct." (T.P. August 23, 2016, pg. 14). Issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Pa.R.A.P. 302(a). This Court is of the opinion that Appellant has waived the right to raise the issue that Pennsylvania's Implied Consent law violates the due process clauses of the Fourteenth Amendment to the United States Constitution and Article 1 Section 9 of the Pennsylvania Constitution because it was not raised on the record at the hearing on August 23, 2016, and because Appellant's counsel specifically indicated that the only issue before the court was whether or not, in light of the Birchfield decision, the civil penalty resulting from a refusal to submit to a blood test without a warrant was unconstitutional.

In the event, however, the issue is not deemed to have been waived, this Court would briefly note that Appellant's argument is without merit. Article 1, Section 9 of the Pennsylvania Constitution deals specifically with the rights of the accused in *criminal prosecutions*. A "license suspension [generally] is properly considered a collateral consequence rather than a criminal penalty. In light of this precedent, suspension of one's driving privilege, whether commercial or personal, has traditionally been considered a civil sanction and not a criminal punishment." ***Kozieniak v. DOT, Bureau of Driver Licensing***, 100 A.3d 326, 331 (Pa. Commw. Ct. 2014). As such, Article 1, Section 9 of the Pennsylvania Constitution does not apply to a license suspension appeal.

**CONCLUSION**

There was no error of law or abuse of discretion committed by this Court. The evidence supports the Court's determination that 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, should be reinstated.

The Court's Order of November 10, 2016, should be affirmed and Appellant's appeal dismissed.

BY THE COURT,

Joy Reynolds McCoy, Judge