IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CP-41-CR-0000811-2017**
v.	:	
	:	
SCOTT CHRISTOPHER MASKER,	:	**SUPPRESSION**
Defendant	:	

OPINION AND ORDER

Scott Masker (Defendant) filed a Motion to Suppress based on Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (2016), on May 30, 2017. A hearing was held on August 29, 2017.

Background

Defendant is charged with Driving Under the Influence of Alcohol or a Controlled Substance[1], an ungraded misdemeanor; and Driving Under the Influence with Highest Rate of Alcohol (second offense)[2], a misdemeanor of the first degree, for an incident on March 5, 2017.

Testimony

Trooper Paul McGee (McGee) testified on behalf of the Commonwealth. He has been employed by the Pennsylvania State Police (PSP), Montoursville barracks as a state trooper for twenty-three years. He has training and experience with DUI and has conducted at least 200 DUI investigations.

On March 5, 2017, McGee was on duty on I-180 in Muncy Creek Township. He was in a marked state police car, operating radar at the crossover. At approximately 7:50 pm, he initiated a traffic stop of a silver BMW traveling at 102 miles per hour.

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[1] 75 Pa.C.S. § 3802(a)(1).
[2] 75 Pa.C.S. § 3802(c).

The driver identified himself as Scott Masker (Defendant). McGee testified that the Defendant initially handed a visa card instead of license but eventually handed him the license. McGee detected a strong odor of an alcohol beverage. McGee observed Defendant to have red blood shot eyes and slurred speech. Based on these observations, McGee asked the Defendant to step out of the vehicle.

McGee requested that Defendant perform field sobriety tests as he suspected he was driving under the influence of alcohol. McGee testified that Defendant had no issues following instructions. McGee instructed Defendant on how to perform the one legged stand, and the heel to toe (walk and turn) tests. McGee testified that Defendant declined to perform one legged stand due to an injury but did perform the walk and turn; Defendant did not perform satisfactorily. McGee testified that Defendant missed a lot of heel to toes and did not turn around as instructed.

McGee testified that Defendant repeatedly told him that he was a Commonwealth employee that worked for Penn DoT and that he knew some troopers. McGee testified that he felt Defendant was "asking for some sort of professional courtesy."

McGee testified that the Defendant admitted to drinking without having been asked. McGee asked Defendant to take a breath test. McGee testified that Defendant replied "It's going to be more than ".08". McGee testified that he told Defendant that he did not have to take the breath test but Defendant did take the test.

McGee described Defendant's demeanor during the traffic stop as cooperative. Defendant did not appear to be confused. McGee arrested Defendant for DUI and took him to ER where they met with a phlebotomist and where Defendant submitted to

the blood draw. McGee denied 1) threatening Defendant 2) tell him he had to take a blood test. Defense Counsel stipulated to the Commonwealth's Exhibit # 2 – Defendant's signed DL26B Form from March 5, 2017. McGee testified that the Defendant was able to follow instructions and denied forcing him to sign the DL26B Form.

Motor Vehicle Recording

The Commonwealth provided the Court, with no objection by Defense Counsel, a DVD of the motor vehicle recording (MVR) of the traffic stop. At 3:02 of the MVR McGee approaches the car identifies himself as a state trooper and lets the driver know that this is a recorded traffic stop. Defendant does initially hand McGee a visa card rather than his driver's license. Defendant is heard stating he "didn't know how fast he was going".

McGee informs Defendant that he was driving at 102 mph and that he can smell alcohol. At MVR 4:11 Defendant states that he works for Penn DoT. At MVR 5:17, McGee calls for back up and calls in the license plate of the silver BMW Defendant was operating. At MVR 8:00 Defendant is asked to get out of the car. McGee inquires whether Defendant is "feeling OK?" The Defendant's responses are not always audible on the recording due to traffic noise from I-180. At MVR 8:40 Defendant tells McGee that he "doesn't normally do this" and that he works for Penn DoT. At MVR 9:00 McGee demonstrates the one legged stand but Defendant repeatedly reaches for his right knee stating that he has a bad knee right now.

McGee then instructs Defendant on heel to toe or the walk and turn test. Defendant is to take 9 steps forward. Defendant takes 11 steps on each pass. At

MVR 12:09 the backup officer arrives. McGee asks Defendant to take a preliminary breath test (PBT) in the field. Defendant states that he is over limit and that he will lose his job. He states that he knows how much he had to drink and that he is trying to get home. Defendant is standing and able to converse during the length of the exchange. Defendant states that he does not want to consent to the PBT because he does not want to lose his license. McGee states that depending on the results of the PBT he would reevaluate the field sobriety tests. At MVR 15:43 McGee states that he is going to take the Defendant to the hospital and request that he take a blood test. McGee indicates that his partner will securely park Defendant's vehicle on the side of I-180 and that if Defendant wants to call someone from the hospital to make arrangements to pick up the car that is fine but the Defendant is not to operate his vehicle. Defendant is handcuffed at MVR 16:27. Much of the exchange is inaudible but at MVR 16:55 Defendant again states "I am going to lose my job" and states that he had a DUI 10 years ago.

At MVR 18:30 McGee explains that as long as Defendant is in transport in the police vehicle that the Defendant has to have handcuffs on. At MVR 20:59 Defendant states "I can't believe I was doing 102" and asks "is my car going to be okay?" The Trooper states that once Defendant is picked up from the hospital he can arrange to have it picked up but that Defendant was not to drive it.

Discussion

> 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." Strickler, 757 A.2d at 901; see also Schneckloth, 412 U.S. at 228-29 (invalidating searches that are the result of "subtl[e] . . .

> coercion" or "stealthy encroachments"); Wright, 190 A.2d at 711 (consents to search "may not be gained through stealth, deceit or misrepresentation . . . ."). "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." Commonwealth v. Reid, 571 Pa. 1, 811 A.2d 530, 549 (Pa. 2002). Such evaluation includes an objective examination of "the maturity, sophistication and mental or emotional state of the defendant . . . ." Strickler, 757 A.2d at 901. 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. See Commonwealth v. Cleckley, 558 Pa. 517, 738 A.2d 427, 433 (Pa. 1999) ("one's knowledge of his or her right to refuse consent remains a factor in determining the validity of consent . . ." and whether the consent was the "result of duress or coercion.")

Commonwealth v. Smith, 77 A.3d 562, 573 (Pa. 2013).

> ... the Commonwealth begins by noting that it is black-letter, well-established law that examinations of the legality and constitutionality of warrantless, but consented to searches and seizures are examined objectively under a totality of the circumstances test to determine whether the consent was "the product of an essentially free and unconstrained choice" and not the result of coercion or duress. Commonwealth v. Strickler, 563 Pa. 47, 757 A.2d 884, 901 (Pa. 2000). Under this maxim, no one fact, circumstance, or element of the examination of a person's consent has talismanic significance. Commonwealth v. Gillespie, 573 Pa. 100, 821 A.2d 1221, 1225 n.1 (Pa. 2003). The Commonwealth notes that, pursuant to this baseline examination, it is a court's function to determine whether a criminal defendant voluntarily and knowingly gave his consent to be subjected to a search or seizure as contemplated by the Fourth Amendment and Article I, Section 8. Walsh, 460 A.2d at 771-72.

Smith at 568-69.

> No one fact or circumstance can be talismanic in the evaluation of the validity of a person’s consent...to the extent the Superior Court held that police officers must explicitly inform drivers consenting to blood testing that the results of the test may be used against them in a criminal prosecution in order for the consent to be valid, it went too far.

Smith at 572.

Defense Counsel agrees with the Commonwealth that the standard for the Court to applying in determining the validity of Defendant's consent is the above listed totality of the circumstances test to determine whether the consent is objectively valid, or is instead the product of coercion, deceit, or misrepresentation. Defense Counsel also provided the Court with case law listing factors for the Court to consider is assessing the totality of the circumstances, and included supplemental factors for the court to consider in its Supplemental Brief. Additionally, Defense Counsel provided the Court with common pleas opinions from around the State determining both the Birchfield issue and validity of consent. The Court addresses case law factors, Defense Counsel's suggested factors and common pleas decisions from sister judicial districts *seriatim*.

From Commonwealth v. Cleckley, 738 A.2d 427, 433 (Pa. 1999), Defense Counsel asks the Court to consider the following factors in making its determination regarding the voluntariness of consent:

1) The defendant's custodial status
2) The use of duress or coercive tactics by law enforcement personnel
3) The defendant's knowledge of his right to refuse consent
4) The defendant's education and intelligence
5) The defendant's belief that no incriminating evidence will be found
6) The extent and level of the defendant's cooperation with law enforcement personnel

From Commonwealth v. Strickler, 757 A.2d 884, 901 (Pa. 2000) Defense Counsel asks the Court to consider the following factors:

1) Though the Constitution does not require proof of knowledge of a right to refuse as the *sine qua non* of effective consent to a search, such knowledge is highly relevant to the determination that there has been consent.
2) The fact that officers themselves informed the defendant that she was free to withhold her consent substantially lessened the probability that their conduct could reasonably have appeared to be coercive.
3) Additionally, although the inquiry is an objective one, the maturity, sophistication and mental or emotional state of the defendant (including age, intelligence and capacity to exercise free will), are to be taken into account.
4) Defendant's consent is not necessarily involuntary where it is given at a time when the defendant knows the search will produce evidence of a crime (finding that the reasonable person test presupposes a reasonable person).

Defense Counsel also asked the Court to consider factors from Commonwealth v. Danforth, 608 A.2d 1044 (Pa. 1992), however, the Court declines to do so. Danforth was overruled in part by Smith *supra* and the Court agrees that Danforth should be overturned. As then Chief Justice Castille wrote in his concurring opinion in Smith

> Walsh and Danforth did create a *per se* rule requiring "knowing" consent regarding the purpose of the search, and the Superior Court here followed in that vein by requiring an officer to explicitly inform the suspect of that purpose. The panel below erred and its mistake was not that it strayed from Walsh and Danforth; the mistake is contained within those precedents, which this Court should squarely disapprove.

Smith at 577-78 (Chief Justice Castille concurrence).

Defense Counsel also requested in its brief and at oral argument that the Court take as Defense Counsel described it a “360 degree view” of the DUI law and how it is applied and how it applies specifically to this case as additionally factors to consider in the totality in the circumstances. Defense Counsel argues that the DUI is unique in all the criminal offenses in that if drivers do not voluntarily consent to a chemical test of the blood, they face increased negative consequences. Drivers can no longer be criminally punished for refusing a chemical test of their blood post-Birchfield but their license is still suspended for refusing a chemical test of the blood post-Birchfield. Defense Counsel analogizes to the case of where police officers request to search a home and the occupant declines. If then the police search the home pursuant to a warrant and find contraband, the criminal punishment is not more severe for the contraband then if the occupant had consented to the search.

Defense Counsel also presents additional legal argument in its “Defendant’s Supplemental Case Timeline”. In what the Court understands to be Defendant’s “Knowledge of the Law is presumed/Ignorance of the Law is no excuse” argument, Defense Counsel argues that because the statutory sections of 75 Pa.C.S. Sections 1547 and 3804 were not amended to reflect the Supreme Court of the United States decision in Birchfield until July 20, 2017, that the Court should consider that Defendant still believed that he would face criminal penalties for refusing because that is what the statutes read on March 5, 2017, the day of his DUI arrest.

Defense Counsel has been successful in the arguments described in the above paragraph and submitted to the Court for its consideration Commonwealth v. Anthony

Bunton, CP-14-CR-507-2017 (decision of Centre County Court of Common Pleas, 6/30/2017) that suppressed the results of a chemical test of the blood because

> Ignorance of the law is no excuse...Defendant was not made aware of his right to refuse a warrantless search because he was not informed that the enhanced criminal penalties of 75 Pa.C.S. § 3804(c) would not be enforced...the Defendant did not intentionally relinquish a known right or privilege.

Additionally, Defense Counsel submitted Commonwealth v. Keith Miller, Berks County Law Journal, Vol 109 at 326-333, a decision of the trial court suppressing blood alcohol results. The trial court in Berks County specifically found that "Penn Dot's unilateral modification of the form did not cure the constitutional defects that are present in Sections 3803 and 3804 of the Motor Vehicle Code and that the Defendant's Consent was therefore, confused, unknowing, and the product of misrepresentation".

This Court has held that DL26B Form (Penn Dot's unilateral modification of the DL26 Form) does comply with Birchfield. Commonwealth v. Clifford Liberti, CP-41-CR-0001933-2016 (order, 10/23/2017, denying reconsideration of Court's decision denying suppression of BAC results); Commonwealth v. Scott Wilt, CP-41-CR-0000251-2017, (opinion and order, 10/18/2017, "the blacked out DL26 form does satisfy the requirements of Birchfield); Commonwealth v. Matthew Gordon, CP-41-CR-0000393-2017, CP-41-CR-0000421-2017 (opinion and order, 9/26/2017, "The Court ... finds that the DL26B does comport to the requirements of Birchfield).

The Court disagrees with Bunton and Miller *supra* based upon the sister trial courts' understanding that the Defendant's consent had to be knowing. As Smith

supra held, the police do not have to inform Defendants of the increased criminal penalties that will result depending on blood alcohol concentration test results.

Defendant's consent does not have to be knowing of all the potential consequences of rendering that consent in order to be voluntary. Moreover, United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966) an Eastern District case from 1966 that the trial courts cite in their decisions finding consent has to be knowing does not state the standard correctly. Schneckloth v. Bustamonte, 412 U.S. 218 (1973) is the standard and is the case that the Supreme Court of the United States in Birchfield directed courts to apply in making the determination of whether consent is voluntary even in cases where some of the police officer's advisories may have been incorrect.

The Court agrees with the decisions Defense Counsel has submitted to the Court in Commonwealth v. Christine McGary, CP-21-CR-0762-2016 (decision, 11/30/2016, denying motion to suppress based on Birchfield) Commonwealth v. Ryan Shaffer, CP-33-CR-154-2017 (decision 6/22/2017 denying motion to suppress based on Birchfield) and especially Commonwealth v. Olubaya Ranger, CR-2459-2016, where the President Judge of the Blair County Court of Common Pleas wrote that the issue for her to decide was not whether the DL26B Form conforms with Birchfield but rather under the circumstances has the Commonwealth proven that the Defendant's consent was 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 Court agrees with President Judge Doyle of Blair County's presentation of the issue. The Court finds that the Commonwealth has established that Defendant did voluntarily consented to a chemical test of his blood.

Defendant was in custody at the time he consented to the blood draw. He was under “arrest” although the Court notes McGee did not explicitly state this in the field. McGee rather said that they were going to the hospital where he would request that Defendant take a blood test. Defendant had no choice in being handcuffed and taken to the hospital but he did have a choice in whether to take the blood test. The Court finds that being in handcuffs and being told one is going to the hospital is not a threat, violence, constraint or other action brought to bear upon someone to do something against his will or better judgement (duress) and that no force or threats were used (coercion).

Defendant had some knowledge of his right to refuse something because he said in the field, even though he did not want to take the PBT, that if he did not take it, he would lose his license. While that is not true, the Court finds that the DL26B Form advises him of his right to refuse by implication. The warnings that were read to Defendant and that he signed consenting to the test is as follows:

> 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.
> 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.
> 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.

McGee told Defendant while they were in the field that he was taking him to the hospital where he was going to request a blood test. The warnings McGee would have read to Defendant and that Defendant signed consenting to the blood draw, *supra*, explicitly say that the blood draw is at the arresting officer's request. The civil consequences of refusal, the suspension of the driver's license is not a threat that the Court finds coercive. It is a consequence of exercising one's driving privilege.

The education level of the Defendant is unknown but he stated he worked for Pennsylvania Department of Transportation so the Court finds that he would be more familiar with the laws that affect transportation, such as the motor vehicle code, than the average driver. Although he did incorrectly state to McGee that he would lose his license if he refused the PBT, a statement McGee did not correct, it appears that Defendant knew he would "lose his license" if he refused to cooperate with the state police in some way but was not clear on exactly where a refusal would render suspension of driving license. It is, as indicated on the DL26B Form, if a driver who has been arrested for suspected driving under the influence refuses to submit to a blood test.

Defendant believed incriminating evidence would be found if he consented to a search. As stated in Strickler "Defendant's consent is not necessarily involuntary where it is given at a time when the defendant knows the search will produce evidence of a crime (finding that the reasonable person test presupposes an innocent person). Strickler at 901.

The Court finds that Defendant cooperated with McGee as both McGee testified to and as the Court observed in the video. Additionally, Defendant is

forthcoming regarding his identity, employment status, his destination, his drinking on the evening in question, and his DUI history. He attempts field sobriety tests and also follows the directions of the PBT. The Court sees no evidence to the contrary to believe that Defendant became any less cooperative while at the hospital and Defense Counsel presented no factual testimony of its own, rather relying on purely legal argument to establish that Defendant's consent could not voluntarily given the totality of the circumstances.

Having concluded its review of the Cleckley factors, the Court moves to address the Strickler factors. The Court finds that Defendant knew he had a right to refuse. The statutory right to refuse is reduced to a form in the DL26B.

Though McGee and the form may have not stated explicitly that Defendant was "free to withhold his consent" it is clear from the form that an option to withhold consent was made available. In sum, under all the factors listed above, the Court finds that a reasonable person in Defendant's situation would have known that he could refuse the blood test and that his consent was given voluntarily. The consent did not have to be knowing and/or intelligent.

Regarding the additional 360 degree factors Defense Counsel argues, the Court does not find them persuasive. Yes, the Defendant does face a negative consequence if he refuses but it is not a criminal charge. The license suspension is still a valid consequence even in light of Birchfield. The Birchfield Court stated so explicitly in its opinion

> 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. See, e.g., McNeely, supra, at ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696, 710 (plurality opinion) ;

> Neville, supra, at 560, 103 S. Ct. 916, 74 L. Ed. 2d 748. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.

Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (U.S. 2016).

The Commonwealth Court affirmed a decision of this court, finding that the license suspension of a Pennsylvania driver who refuses to submit to a chemical test of the blood is not constitutionally infirm in light of Birchfield. Marchese v. Commonwealth, 169 A.3d 733 (Pa. Cmwlth. 2017).

The analogy between a homeowner not consenting to a search and then not facing increased consequences if contraband is later found in the home pursuant to a search warrant is not persuasive to the Court. A home is not a motor vehicle. It is not a potentially dangerous instrumentality that could lead to the death of the operator and others. Because of the different ramifications of driving under the influence, the laws regarding them are different. The Supreme Court of the United States thoroughly reviewed the history of implied consent laws in the Birchfield opinion and the Court will follow the law as held by the Birchfield Court.

Which brings the Court to Defense Counsel's final legal argument, that because the statutes in Pennsylvania were not changed to reflect Birchfield's holding until July of 2017, that Defendant would have constructively believed he would face a criminal punishment if he refused regardless of McGee's warnings. The standard however is an objective one not a subjective one so regardless of what Defendant believed nothing occurred in the exchange whereby McGee would have told or implied that there was a criminal consequence to refusal. As such, the decision of the Court is that the physical evidence collected as a result of Defendant's consent to a blood draw will not be suppressed.

ORDER

AND NOW, this 16th day of November, 2017, based upon the foregoing Opinion, the Defendant's Motion to Suppress is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

cc: Brian Manchester, Esq.
Scott Werner, Esq.
Gary Weber, Esq.