IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-251-2017**
v.	:	
	:	
SCOTT MATTHEW WILT,	:	**SUPPRESSION**
Defendant	:	

OPINION AND ORDER

Scott Wilt (Defendant) filed a Motion to Suppress March 30, 2017. On April 19, 2017. Hearing and argument were held on August 18, 2017. Defense Counsel argues that the Commonwealth's implied consent law as expressed on the blacked out DL26 form[1] 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).[2] The Court disagrees and finds that the blacked out DL26 form does satisfy the requirements of Birchfield. In addition, 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

Defendant is charged with Driving Under the Influence-general impairment/incapable of safe driving[3], an ungraded misdemeanor; Driving Under the Influence - high rate of alcohol: Blood[4], an ungraded misdemeanor; and Parking in a

[1] In the facts here, the police officer used a DL26 form with references to criminal penalties for refusal blacked out.
[2] Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (2016).
[3] 75 Pa.C.S. 3802(a)(1).
[4] 75 Pa.C.S. § 3802(b).

Prohibited Place[5], a summary offense. The charges arise out of an incident occurring on October 29, 2016, in Williamsport, PA.

Testimony

Testimony of Anitrea Riles, Phlebotomist

Anitrea Riles (Riles) testified on behalf of the Commonwealth that she has been employed by SHS for four years as a phlebotomist and one of her duties is drawing blood from allegedly intoxicated individuals. The Commonwealth submitted as Exhibit 1 the form that Riles used to document that she drew the Defendant's blood on the evening in question. She identified Defendant in the courtroom as being the same individual from whom she drew blood. She further testified that Defendant did not have any problems with the blood draw, she was with the Defendant for five (5) minutes and that he was sitting down during the procedure. She could not remember whether she could smell the odor of alcohol on the Defendant's breath.

Testimony of Officer Charles O'Brien

Officer Charles O'Brien (O'Brien) of the Penn College of Technology Police, testified on behalf of the Commonwealth. He has been employed with Penn College since December of 2006 and received standardized field sobriety testing, ARIDE training and subsequent refreshers for the both.

On October 29, 2016, at approximately 4:40 pm, O'Brien was alone on patrol, in full uniform, in a marked police vehicle. He was approached by a Penn College custodian in the 1640 College Avenue labs parking lot regarding a female slumped over in a vehicle.

[5] 75 Pa.C.S. § 3353(a)(3)(ii).

O’Brien advised the 911 center that he was in route to investigate. He turned left (North onto Park Street) and observed a vehicle parked in a “no parking” area. He traveled by the illegally parked vehicle. Defendant was in the driver’s seat and what he believed to be a female was in the passenger seat. O’Brien drove behind the vehicle, activated emergency lights, and made contact with the vehicle and its driver.

Defendant rolled down the window a little bit. O’Brien identified himself, advised the Defendant that he was parked in a no parking zone, and showed him the “no parking” sign in front of his vehicle. The Defendant stated he was parked there to engage in a sex act with his passenger. His fly was down on his jeans. He had red glossy eyes and slurred speech.

When O’Brien asked for a driver’s license, registration, and proof of insurance, Defendant shut the vehicle off and was able to provide O’Brien with the requested documents. Based on the appearance of his eyes and his slurred speech, O’Brien asked the Defendant to exit the vehicle. Defendant was able to do so under his own power and complied with O’Brien’s request.

O’Brien advised the Defendant to come to the rear of his vehicle and Defendant complied. When the Defendant got to rear on his vehicle, he was not able to stand on his own without leaning back on his tailgate. He was not able to complete field sobriety tests (one leg stand and walk and turn) to O’Brien’s satisfaction.

O’Brien ensured that Defendant understand the directions by asking Defendant if he understood. Defendant said he was “f-ed” and he was going to lose his job because he drives for a living. At this point, O’Brien placed him under arrest for suspicion of DUI because he believed that Defendant was incapable of safe driving.

When Defendant and O'Brien arrived at WRMC, O'Brien read him the blacked out DL26 form which the Commonwealth submitted as its Exhibit 3. Blacked out on the form is any reference to criminal penalties for refusing to consent to the chemical test of the Defendant's blood.

O'Brien testified that he read the form to Defendant twice, to be sure the Defendant understood. O'Brien denied forcing, threatening or raising his voice. O'Brien was present while Defendant gave blood.

After the blood draw, O'Brien rehandcuffed Defendant and took him to the police station for processing: fingerprints, photographs, and the collection of demographic information. Defendant was able to comply with all instructions.

Discussion

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.

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 warrantless search of Defendant's blood was unreasonable unless an exception to the requirement that police obtain a warrant existed at the time of the search. 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 O'Brien 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. The form that O'Brien 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 which would have vitiated 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 blacked out DL26 form 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 no right to speak to a lawyer.

It seems to the Court that Defendant voluntarily signed the blacked out DL26 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), could not 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 O'Brien 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. O'Brien 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 is not the first DUI or first refusal 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 had been blacked out from the form and in fact, drivers who refuse are not punished criminally for their refusal in a post Birchfield legal environment. Finding the testimony of both the phlebotomist and the arresting officer credible, the Court finds that Defendant's consent was voluntary and not the product of a will overborne or coercion on the part of the arresting officer, or the circumstances. His consent was voluntary thus obviating the need for the arresting officer to obtain a search warrant.

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 voluntary 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).

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). The Court does not find that the officer telling Defendant he had no right to speak to an attorney before deciding whether to consent vitiated his voluntary consent.

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, and Commonwealth v. Cleckley[6], making the Schneckloth v. Bustamonte standard the Pennsylvania standard 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.[7] 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).

[6] 738 A.2d 427, 433 (Pa. 1999).
[7] If he indeed had that constitutional right which this Court does not now hold.

The Court finds the blacked out DL26 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[8] this Court finds that the blacked out DL26 form used encompasses the statutory to right to refuse.

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[9] 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 in certain respects, regarding the test for determining whether consent was freely and

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

[9] 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.

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.

As established by the facts here, Defendant was approached by police while parked illegally. Though successful in producing his vehicle documents, his eyes were glassy and his speech was slurred. He was unable to support his own weight and had to rely on his vehicle for support. He was unable to perform field sobriety tests to satisfaction. He knew that he was in serious trouble because he remarked that he was and that he was a professional driver. Neither the officer or the phlebotomist testified to having any concerns regarding what appeared to be Defendant's understanding of the test that was to be performed. Though he was handcuffed and in custody, the Court does not find that custody to be so coercive as to vitiate the Defendant's ability to voluntarily consent. Finding the testimony of both the phlebotomist and the arresting officer credible, the Court finds that Defendant's consent was voluntary and not the product of a will overborne or coercion on the part of the arresting officer, or

the circumstances. His consent was voluntary thus obviating the need for the arresting officer to obtain a search warrant.

The form itself, the Court believes comports with the law as announced in Birchfield. Any reference to criminal penalties for refusing to test had been blacked out 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 237 (“the requirement of a knowing and intelligent waiver (“an intentional relinquishment or abandonment of a known right or privilege") has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.”

When Defendants consent to a search 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 waiving 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 *supra*, the Court does not believe the Defendant was coerced into consenting to the blood draw.

ORDER

AND NOW, this 18th day of October, 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.