IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**1787 MDA 2016**
Appellant	:	
v.	:	DOCKET NO.: CR – 1083-2014
	:	OTN: T -461660-3
KIRK HAYS,	:	
Defendant/Appellee	:	**APPEAL / 1925 (a)**

OPINION AND ORDER

Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925 (a)

This Court issues the following Opinion and Order pursuant to P.R.A.P. 1925(a). The Commonwealth appeals from an October 14, 2016 Order granting Kirk Hays a new trial in light of the U. S. Supreme Court's decision in Birchfield v. North Dakota, 136 S. Ct. 2160 (2016). On June 22, 2016, the jury found Mr. Hays guilty of driving under the influence ("DUI") general impairment and DUI highest rate of alcohol (BAC .16 +).[1] The following day, on June 23, 2016, the U.S. Supreme Court decided Birchfield. On August 23, 2014, the Court sentenced Mr. Hays. The Commonwealth agreed that no sentence be imposed as to Count 2, DUI highest rate of alcohol due to Birchfield.[2] As to Count 1, driving under general impairment, incapable of safe

[1] 75 Pa.C.S.A. §§ 3802(a)(1) & 3802 (c), respectively. As to the summary offenses, the Court found Mr. Hays not guilty of violating 75 Pa. C.S.§ 3309 (1) , disregarding traffic lane, and not guilty of violating 75 Pa. C.S.§ 3814 (a), careless driving, but found Mr. Hays guilty of failing to give an appropriate signal, in violation of 75 Pa. C.S.§ 3334 (a).

[2] The exchange at sentencing as to Count 2 was as follows:

> THE COURT: Have you and the DA's office conferred at all about the situation? I mean, I would propose to go ahead and sentence under the Count 1 and –
>
> MR. BARROUK: That is –
>
> THE COURT: Count 2 goes by the way side, is that the long and short –
>
> MR. BARROUK: That's the agreement we reached, yes.

Transcript of Proceedings (Sentencing) held August 23, 2014 ("N.T. 8/23/14") at 2:8-14.

driving, the court imposed a sentence of incarceration in the Lycoming County Prison for a minimum of five days and a maximum of six months.[3]

In its concise statement, the Commonwealth raised the following issues for appeal.

1. Did the trial court err by granting Defendant's post-sentence motion for a new trial even though Defendant failed to properly preserve the suppression argument that his consent for a blood draw was coerced?

2. Did Birchfield v. North Dakota, 136 S. Ct. 2160 (2016) create a new constitutional right, as opposed to a rule, superseding the requirement to properly preserve issues for appeal?

For the reasons stated on the record, and in this Court's Order dated October 14, 2016, and as further discussed below, this Court respectfully requests that its Order granting a new trial be affirmed. Following is a brief factual background of the case followed by discussion of the issue raised by the Commonwealth in its concise statement.

FACTUAL BACKGROUND

On April 11, 2014 Pennsylvania State Troopers conducted a traffic stop after observing Kirk Hays' vehicle turn without displaying a turn signal. After receiving results of Mr. Hay's blood alcohol content, on May 3, 2014 Trooper Kirk charged Mr. Hays with two counts of DUI: Count 1, general impairment/incapable of driving safely pursuant to 75 Pa.C.S.A § 3802 (a)(1), and Count 2 driving under the highest rate of alcohol (BAC .16+) under 75 Pa.C.S.A § 3802 (c). Trooper Kirk also charged Mr. Hays with three summary traffic offenses: (1) disregarding traffic lane, in violation of 75 Pa.C.S.A § 3309(1), (2) failure to give appropriate signal, in violation of 75 Pa.C.S.A § 3334(a), and (3) careless driving in violation of 75 Pa.C.S.A § 3814(a)). The Court scheduled a guilty plea hearing for September 19, 2014. That hearing was continued to December 19, 2014. On December 19, 2014, the Court granted Mr. Hays' attorney leave to

[3] The Court also imposed fines and fees, community services, counseling and alcohol highway safe driving school.

withdraw and new counsel, Qiana M. Lehman, Esquire, entered an appearance. The case was continued to status for March 20, 2015 and counsel was granted permission to file a nunc pro tunc suppression motion.

On January 21, 2015, Mr. Hays, by and through his attorney at that time, filed his omnibus pre-trial motion. As part of that motion, Mr. Hays sought to exclude and suppress all evidence gathered as a result of his allegedly unlawful arrest made without reasonable suspicion, including the results of any and all blood tests, resulting from the illegal stop and arrest, and any and all other evidence resulting therefrom.[4] Mr. Hays did not seek to suppress his blood alcohol results on the grounds that he could not be deemed to have consented as pronounced in Birchfield. As discussed infra, up until and well after that point and time, Pennsylvania's Appellate Courts repeatedly held that the implied consent law was constitutional and blood alcohol count results obtained under that law were admissible. On May 22, 2015, following a hearing, the Honorable President Judge Nancy L. Butts denied the omnibus pre-trial motion to suppress evidence based upon an unlawful arrest, concluding that the stop was lawful. Troopers articulated observable facts that Mr. Hays violated 75 Pa. C.S. § 3334 (a) by failing to use a turn signal when turning. On August 25, 2015, Mr. Hays' current counsel, Timothy Barrouk, Esquire, entered his appearance as counsel for Mr. Hays.

The Undersigned presided over a jury trial held on June 22, 2016. During the deliberations, the jury **specifically asked** whether it could consider the blood alcohol test results when deciding whether Mr. Hays was guilty of Count 1, general impairment/incapable of driving safely. The Court informed the jury that it could consider the blood alcohol results when deciding whether Mr. Hay was guilty of the general impairment count. The jury returned a

[4] Mr. Hays also moved to suppress evidence based upon an alleged failure to preserve evidence of the dash cam video of the stop in violation of Pa. Rule of Criminal Procedure 573(b). The Court concluded that Mr. Hays did not support the allegation that the video was exculpatory or that the Commonwealth acted in bad faith.

verdict of guilty as to both counts. After review of the evidence, the Court found Mr. Hays **not guilty** of two of the summary offenses: careless driving and disregarding the traffic lane. The Court found Mr. Hays guilty of the summary offense of failing to signal when turning.

On August 23, 2016, the Commonwealth agreed that no sentence be imposed as to Count 2, DUI highest rate of alcohol due to Birchfield. Consequently, the Court sentenced Mr. Hays as to Count 1 only. On September 1, 2016, Mr. Hays filed a post-sentence motion challenging the voluntariness of his consent to the blood draw in light of Birchfield. In its opposition, the Commonwealth asserted for the first time that Mr. Hays failed to preserve the Birchfield issue by not raising it in his omnibus motion filed on January 21, 2015.

DISCUSSION

At issue on appeal is whether the trial court abused its discretion in granting Mr. Hays a new trial on the general impairment count in light of the Birchfield decision. In granting a new trial, the Court recognized that Birchfield implicates fundamental, constitutional concerns with respect to consent for blood alcohol testing. In Birchfield, the U.S. Supreme Court concluded that consent on the pain of committing a criminal offense was involuntary. In Pennsylvania the implied consent laws impose a duty on a police officer to inform the motorist of increased criminal sanctions for refusal to consent to blood alcohol testing upon a conviction or plea to driving under the influence, general impairment[5] for a refusal to consent to blood alcohol testing. 75 Pa. C.S.§ 1547(2)(ii). As a result, the Birchfield decision raises questions as to consent to blood alcohol testing provided under Pennsylvania's implied consent laws.

In this case, the Commonwealth already conceded that no sentence be imposed as to the conviction for driving under the highest rate of alcohol due to Birchfield. As to the general impairment count in this case, the evidence was extremely weak: the defendant was not guilty of

[5] 75 Pa.C.S.A § 3802 (a)(1).

careless driving or disregarding traffic lanes. Furthermore, during deliberations, the jury specifically questioned whether it could rely on the blood alcohol results before finding Mr. Hays guilty of the general impairment count. As such, the Court believes Mr. Hays was significantly prejudiced by the blood alcohol results in a similar way as the breath test results prejudiced the defendant in Commonwealth v. Marshall, 824 A.2d 323 (Pa. Super. 2003). Therefore, the Court concluded that Mr. Hays should have a new trial and opportunity to suppress the blood alcohol content results.

On September 1, 2016, Mr. Hays filed a post-sentence motion challenging the voluntariness of his consent to the blood draw in light of Birchfield thus seeking to challenge his conviction of driving under the influence, general impairment. In its opposition, the Commonwealth asserted for the first time that Mr. Hays failed to preserve the Birchfield issue by not raising it in his omnibus motion filed on January 21, 2015. The Commonwealth contended it had not waived an argument about the BAC at sentencing because the decision to sentence only on Count 1 was "for lack of a better term, that was a gift from the Commonwealth[.]" Transcript of Proceedings, argument held October 14, 2016, ("N.T. 10/14/16") at 3:24-25; 5:3.

This Court respectfully submits that the Commonwealth waived the preservation issue when, on August 23, 2016, the Commonwealth agreed that no sentence be imposed as to Count 2, DUI highest rate of alcohol due to Birchfield but did not specifically state on the record that the Commonwealth was presenting a so called "gift" to Mr. Hays and was preserving the failure to preserve issue as to Count 1. The Commonwealth should have put on the record that, despite failure to preserve the issue, and for essentially no reason, as a gift, the Commonwealth would seek no sentence for the DUI, highest rate of alcohol crime. Nothing of that nature was stated on the record at the time of sentencing. N.T. 8/23/14. Therefore the Commonwealth waived the preservation issue.

Even if the Commonwealth did not waive the preservation issue at the time of sentencing, the Court believes the circumstances of this case warranted a new trial for Mr. Hays on the remaining general impairment count.

The general rule is that a timely motion for suppression shall be contained in the omnibus pretrial motion set forth in Pa.R.Crim.P. Rule 578 or it is waived. However, Rule 581 permits a supplemental suppression motion when "the opportunity did not previously exist or the interests of justice otherwise require." Pa.R.Crim.P. 581(B) "Whether 'the opportunity did not previously exist, or the interests of justice otherwise require . . .' is a matter for the discretion of the trial judge." Commonwealth v. Williams, 229 Pa. Super. 390, 396, 323 A.2d 862, 864 (Pa. Super. 1974), *citing*, Commonwealth v. Pinno, 433 Pa. 1, 248 A. 2d 26 (Pa. 1968). In the present case, the opportunity to raise the Birchfield issue of consent did not previously exist given the law in Pennsylvania and/or the interest of justice required the consideration of the post-sentence motion to determine the voluntariness of the consent to blood alcohol testing in light of Birchfield.

Prior to Birchfield, the binding case law in Pennsylvania was that the implied consent law was constitutional and BAC results obtained under that law were admissible. In Commonwealth v. Stair, 548 Pa. 596, 606-607, 699 A.2d 1250, 1255-1256 (Pa. 1997) our Pennsylvania Supreme Court stated that BAC testing was not obtained in violation of the Fourth Amendment of the United States Constitution's guarantee against unreasonable searches and seizures where a Pennsylvania State Police Trooper lawfully administered Pennsylvania's Implied Consent Law in another state to a driver operating a vehicle in Pennsylvania. In Commonwealth v. Beshore, 2007 PA Super 19, 916 A.2d 1128, 1141-1142 (Pa.Super. 2007) (en banc), appeal denied, 603 Pa. 679, 982 A.2d 509 (Pa. 2007)(citations omitted) the Superior Court reiterated that there was no constitutional right to refuse blood testing and therefore refusal could be used against defendant at trial. Beshore, 916 A.2d at 1142-1143. As recently as **June 16, 2016**, in

Commonwealth v. Carley, 2016 PA Super 127, 141 A.3d 1287 (Pa. Super. 2016), our Pennsylvania Superior Court again reiterated that there was and is no constitutional right to refuse blood alcohol testing both prior to the U.S. Supreme Court decision in Missouri v. McNeely, U.S. , 133 S.Ct. 1552, 185 L. Ed. 2d 696 (2013), and after McNeely.

In direct reversal of the binding authority in Pennsylvania, the day following Mr. Hays' conviction on June 23, 2016, the Supreme Court of the United States concluded and pronounced "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." Birchfield, supra at 2186. The question presented in Birchfield was whether the implied consent laws, which impose criminal penalties for refusals, violate the Fourth Amendment's prohibition against unreasonable searches. Id at 2167. The U.S. Supreme Court concluded that consent on the pain of committing a criminal offense was involuntary.

In the present case, the Commonwealth conceded that it has no argument that Birchfield would not be retroactive where the issue was properly preserved, but ***only*** where it was properly preserved. N.T. 10/14/16, 3: 7-11. In support, the Commonwealth relied on predominately one case, Commonwealth v. Cabeza, 503 Pa. 228, 469 A.2d 146 (Pa. 1983).[6] This Court does not believe Cabeza precludes a new trial for Mr. Hays for failure to preserve the Birchfield issue. First, unlike the constitutional proclamation in Birchfield, the new rule in Cabeza was not constitutionally compelled. Cabeza, supra, 503 Pa. at 231 & 234 (dissent), 469 A.2d at 147 & 149 (dissent). The new rule in Cabeza was an evidentiary rule abrogated by the Pennsylvania Supreme Court, not a constitutional pronouncement by the U.S. Supreme Court.

Second, the preservation issue was not before the Court in Cabeza. The defendant in Cabeza preserved the issue as to the new rule at every stage in the litigation. Cabeza states that a

[6] In Cabeza the Pennsylvania Supreme Court applied a new evidentiary rule set forth in Commonwealth v. Scott, 496 Pa. 188, 436 A.2d 607 (Pa. 1981) to the defendant's case retroactively. The new rule in Scott abrogated the Pennsylvania case law that permitted cross-examination of character witnesses about arrests that did not result in conviction to rebut character evidence.

new rule is to be applied retroactively to cases where the issue in question is properly preserved at all stages of adjudication. The context of this holding was the Court's conclusion that application of an enlightened rule to similarly situated cases "should not be determined by the fortuity of who first has his case decided by an appellate court." Cabeza, supra, 503 Pa. at 233, 469 A.2d at 148. Since the defendant in Cabeza raised the issue at every stage of the adjudication, the case was similarly situated to Scott, supra, n. 6, and the Court applied the new rule. Cabeza did not decide the issue of whether to ignore a constitutional pronouncement that was not raised by a motion to suppress evidence filed more than a year prior to the U.S. Supreme Court decision.[7]

CONCLUSION

In sum, this Court believes the interest of justice compelled a new trial for Mr. Hays in light of Birchfield under the circumstances of this case. For the foregoing reasons and for the reasons stated on the record and in this court's order dated October 14, 2016 granting a new trial, this Court respectfully submits that its Order granting Kirk Hays a new trial be affirmed.

BY THE COURT,

January 19, 2017
Date

_____
Richard A. Gray, J.

cc: DA (AC)
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THE MCSHANE FIRM LLC, 3601 Vartan Wy Fl 2, Harrisburg, PA 17110-9440
(Superior & 1)
Prothonotary (LG)

[7] Carley, supra, was decided by the Pennsylvania Superior Court just seven days prior to Birchfield but Carley did not anticipate the Birchfield ruling at that time.