

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
	:	
vs.	:	No. CR-487-2019
	:	
BALAN COSTA,	:	
Defendant	:	
	:	
Michael S. Greek, Esquire	:	Counsel for Commonwealth
Joseph Yeager, Esquire	:	Counsel for Defendant

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MEMORANDUM OPINION

Matika, J. - May 15, 2020

Before this Court is the Defendant, Balan Costa's combined Motion to Dismiss/Motion to Suppress filed on August 15, 2019. For the reasons stated in this Opinion, this Court grants the Motion to Dismiss Count I, but declines to dismiss Count II or suppress the results of the blood test.

FACTUAL AND PROCEDURAL BACKGROUND

On February 8, 2019 at approximately 10:00 A.M., Officer Charles McFeeley, Jr. (hereinafter "McFeeley") of the Weatherly Borough Police Department was conducting a traffic stop on a vehicle located on Plane Street in the borough. While McFeeley was seated in his marked patrol car, he observed another vehicle, travelling at what he perceived to be a high rate of speed, pull

up in front of the vehicle he was investigating and park. He then observed the driver, later identified as Balan Costa (hereinafter "Costa") walk over to the passenger side of the other vehicle. At that point McFeeley exited his vehicle and approached Costa. While engaging in conversation with Costa as to why he was there<sup>1</sup>, McFeeley observed that Costa had pinpoint pupils, lower eyelid tremors and bloodshot and glassy/watery eyes. Based upon these observations, McFeeley felt it necessary to detain Costa and subject him to a battery of sobriety tests. McFeeley indicated that he first had Costa perform the "walk and turn" and "one-legged stand" tests. McFeeley testified that Costa showed no signs of impairment on the one-legged stand test, but displayed 2 out of 8 clues of impairment on the walk and turn test.<sup>2</sup>

Because he is trained and has experience in the use of A.R.I.D.E.<sup>3</sup>, McFeeley next conducted several additional tests and made several additional observations of Costa. These consisted of

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<sup>1</sup> It was determined that the driver of the other vehicle must have called Costa to pick him up as he did not have a license to drive.

<sup>2</sup> While McFeeley did not elaborate on the full details surrounding the result of this test, he did indicate that Costa missed touching his heel to his toe 3-4 times. In other words, as McFeeley described it, Costa did not touch his heel to his toe on several of his steps during this test.

<sup>3</sup> A.R.I.D.E. is an acronym for "Advanced Roadside Impairment Driving Enforcement."

the lack of convergence test<sup>4</sup> and the Romberg balance test.<sup>5</sup>

Based upon the totality of the circumstances, McFeeley determined that Costa was under the influence and placed him under arrest.

In anticipation of taking Costa for a blood test, McFeeley read verbatim to Costa the DL-26B (1-18) form,<sup>6</sup> otherwise known as the Implied Consent form. Thereafter, McFeeley took Costa to the Lehigh Valley Hospital-Hazleton campus for a blood test, which the Defendant consented to.

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<sup>4</sup> The lack of convergence test is one in which the police officer uses a stimulus, such as a pen, placed approximately 12-15 inches from a person's nose and then, while moving that stimulus, the officer looks to see how eyes react. While moving the stimulus within one inch of the bridge of the person's nose, the officer notes that person's eye reaction. If the eyes come together, i.e. convergence or cross, a lack of converge is not present. Based upon McFeeley's conducting of this test, he determined that there was no lack of convergence, which in this case meant Costa passed that test.

<sup>5</sup> In the Romberg balance test, an individual is told to stand straight with his feet together, arms at his side. He is also told to slightly tilt his head backwards, close his eyes and estimate the passage of thirty (30) seconds. Once that estimation is complete, the person is to open his eyes. The officer is tasked with making observations of the person's movements looking for such things as eyelid tremors, muscle jerking or other involuntary movements. In addition, the officer is looking to see if the person has the cognitive ability to "estimate" thirty (30) seconds. As Costa performed these tests, McFeeley detected eye tremors. Nothing else was improper with the way Costa performed.

<sup>6</sup> The Commonwealth introduced as Exhibit 1 an unsigned copy of the form McFeeley claimed he used that night to read the blood testing warnings to Costa. When asked if one had been executed by himself or the Defendant, McFeeley indicated no, and that "[T]he reason why I don't sign the form or have the Defendant sign the form is because when I took my SFST class, I was informed that we only had the Defendant sign the form, that we sign the form if we're going to mail it in as they refused, and when I also took my A.R.I.D.E. class, they informed us the same thing. The Defendant only signs it if they were refusing." (N.T. p. 15, October 8, 2019 hrg.)

On March 22, 2019, the Defendant was charged with two counts of DUI under the Vehicle Code, namely 75 Pa.C.S.A. §3802(a)(1) and 75 Pa.C.S.A. 3802(D)(1). On August 15, 2019, Costa filed the motion presently before this Court. This filing consisted of a Motion to Dismiss Count I, DUI General Impairment as well as a multi-faceted Motion to Suppress. In the Motion to Suppress, Costa raised six issues<sup>7</sup> for consideration. A hearing was held on October 8, 2019 after which time both counsel were directed to lodge briefs in support of their respective positions. Costa lodged his brief

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<sup>7</sup> In the motion to suppress, Costa claims that the evidence, i.e., blood test results, should be suppressed for the following reasons:

- a. Pursuant to the United States Supreme Court ruling in *Birchfield v. North Dakota* the results of any blood testing should be suppressed.
- b. A copy of the implied consent warnings were not provided in the Discovery materials provided by the Commonwealth and as such it is believed that either no such form was read and/or signed by the Defendant and as such Defendant was unable to make a knowing, intelligent and voluntary decision to submit to chemical testing.
- c. In that Defendant was charged with Driving Under the Influence Incapable of Safe Driving after imbibing a sufficient amount of alcohol and in fact there was no testimony, documentation or statement of facts in the affidavit of probable cause to support such an allegation there existed insufficient grounds to request Defendant to submit to chemical testing.
- d. In that marijuana has been found to have medical benefits and the fact that the Pennsylvania Legislature has legalized medical marijuana, Marijuana nor its metabolite can be classified as a Schedule I controlled substance, Count 2 of the information should be dismissed and/or suppressed as a matter of law.
- e. The officer lacked probable cause to request the Defendant to submit to chemical testing in this matter as the Defendant performed the field sobriety tests in a substantially acceptable manner and as such the results of said testing do not constitute probable cause to request an individual to submit to chemical testing.
- f. Pursuant to the Article I section 8 of the Pennsylvania Constitution the blood results in the above-captioned should be suppressed as the search and seizure of the blood sample of the Defendant was not obtained in a legally acceptable manner.

on November 8, 2019; the Commonwealth failed to lodge any brief. This matter is now ripe for disposition.

### LEGAL DISCUSSION

#### I. MOTION TO DISMISS

At the hearing, counsel for the Commonwealth agreed that there was insufficient evidence that alcohol was involved whatsoever in this incident. We agree. Accordingly, we will grant this motion and dismiss Count I of the information, DUI-General Impairment, 75 Pa.C.S.A. §3802 (a)(1).

#### II. MOTION TO SUPPRESS

Rule 581(H) of the Pennsylvania Rules of Criminal Procedure ("Rule 581(H)") provides in pertinent part that "[t]he Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of defendant's rights." See Pa.R.Crim.P. 581(H). With respect to all motions to suppress, the Commonwealth bears the burden of production. See Pa.R.Crim.P. 581(H), Comment citing *Commonwealth ex rel. Butler v. Rundle*, 239 A.2d 426 (Pa. 1968). The Commonwealth also bears the burden of persuasion. See *Id.* citing *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630 (1966). The Commonwealth must satisfy its burden of proof in

a suppression hearing by a preponderance of the evidence. See *Id.* citing *Commonwealth ex rel. Butler v. Rundle*, *supra*.

In a motion to suppress evidence, the Commonwealth bears the burden to establish that it did not obtain the evidence in question in violation of the defendant's rights. *Commonwealth v. Ryan*, 407 A.2d 1345, 1348 (Pa. Super. Ct. 1979). "The Fourth Amendment of the United States Constitution and Article I, Section VIII of the Pennsylvania Constitution guarantee individual's freedom from unreasonable searches and seizures." *Commonwealth v. El*, 933 A.2d 657, 660 (Pa. Super. Ct. 2007).

In the case *sub judice*, Costa seeks relief in the form of suppressing the blood results and/or dismissal of Count II based upon any or all of six perceived violations of his constitutional rights. We will address each such claim seriatim.

#### A. BIRCHFIELD CLAIM

Costa's first argument under his motion to dismiss/suppress alleges that the blood results should be inadmissible and suppressed pursuant to *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016). Notwithstanding that Costa has failed to advance this argument at the hearing or in his post hearing brief, we are nonetheless constrained to dismiss this argument even if he had. At the hearing, the Commonwealth presented testimony from McFeeley

as well as Exhibit 1, a copy of the DL-26B form, that was read verbatim to Costa by McFeeley. This form, revised in January, 2018 by the Pennsylvania Department of Transportation as noted thereon, was in response to Birchfield and removed the questionable language challenged by Birchfield years earlier. Thus, Birchfield has no application to the set of facts before this Court.

B. IMPLIED CONSENT WARNINGS/FORM

Costa next posited an argument that: 1) the Commonwealth failed to provide a copy of the DL26 form used by McFeeley that day; and 2) no such form was read and/or signed by Costa and as such Costa was unable to make a knowing, intelligent and voluntary decision on the issue of whether to submit to chemical testing of his blood. Similarly, while Costa cross-examined McFeeley briefly about this issue, we believe the argument has likewise been abandoned by his failure to address it in his brief. Nonetheless, we will still address it here.

At the hearing, McFeeley testified that he provided Costa with these implied consent warnings by reading them verbatim from a DL-26B form similar to the one admitted into evidence. McFeeley further testified that after doing so and receiving consent from Costa to submit to a blood draw, Costa was taken to the hospital for that test. As to the issue of an unexecuted DL-26B form,



McFeeley testified that the reason neither his nor Costa's signatures appear on this form was because during his training on the use of standard field sobriety tests and A.R.I.D.E. training, he was informed that it was not necessary that anyone execute this document unless it was going to be sent in because a defendant did refuse the test.<sup>8</sup> In this case, Costa, as referenced supra, consented to this test. In order for consent to be valid, it must be unequivocal, specific, and voluntary. *Comm. v. Gorbea-Lespier*, 66 A.2d 382, (Pa. Super. Ct. 2013), *appeal denied*, 77 A.3d 1259. McFeeley's testimony revealed that he read verbatim the implied consent warnings from the DL-26B form to the Defendant and that he, Costa, "understood that and he consented to the blood draw." Based upon the limited amount of testimony referenced above, and the lack of testimony to the contrary, this Court finds that the consent cannot be anything but unequivocal, specific and voluntary.

As to the issue of not turning over a copy of the implied consent warnings form (DL26B) to counsel for the Defendant, the Commonwealth cannot turn over something that does not exist.

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<sup>8</sup> The Court refuses to address the lack of execution of the DL-26B (1-18) form as Costa has not raised this specific issue beyond the reference to "signed by the defendant" in his motion.



McFeeley testified that no such form specific to Costa exists as neither McFeeley himself nor Costa executed any.<sup>9</sup>

Accordingly, we see no violation of any of Costa's constitutional rights as alleged herein and accordingly, will refuse to suppress the blood test results as to these claims.

C. DUI-GENERAL IMPAIRMENT - 3802(A)(1)

As previously noted in this opinion, the charge of DUI-General Impairment, an alleged violation of 75 Pa. C.S.A. §3802(a)(1) should be dismissed for lack of supporting facts. Accordingly, we need not address it further here under the Defendant's Motion to Dismiss. Further, our dismissal of this charge, under no circumstances would require a suppression of the blood test results as there were other *indicia* of impairment that McFeeley relied upon. McFeeley testified that he observed Costa to have pinpoint pupils, lower eyelid tremors, bloodshot and glass/watery eyes and exhibited several clues of impairment in doing the walk and turn test. Based upon the totality of circumstances known to McFeeley, he believed that Costa may be impaired. Accordingly, he requested consent for a blood draw. We believe McFeeley had probable cause

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<sup>9</sup> We note that a copy of Commonwealth Exhibit 1, a blank DL26B form being used by the Weatherly Police Department during this time frame, was provided to defense counsel at the hearing.

to believe that Costa was driving under the influence and thus possessed reasonable grounds to administer a blood test.

D. MEDICAL MARIJUANA AS A SCHEDULE I CONTROLLED SUBSTANCE

Costa next argues that because Pennsylvania has legalized marijuana for medical purposes while maintaining marijuana as a Schedule I Controlled Substance, Count 2, an alleged violation of 75 Pa. C.S.A. §3802(D)(1) must be dismissed or the blood results suppressed.

Costa, in his brief, referenced his mindfulness of the cases of *Commonwealth v. Jezzi*, 208 A.3d 1105 (Pa. Super. Ct. 2019) and *Commonwealth v. Handley*, 213 A.3d 1030 (Pa. Super. Ct. 2019). These cases stand for the proposition that the Medical Marijuana Act, 35 P.S. §10231.101 et seq. and the Controlled Substance, Drug, Device and Cosmetic Act §35.P.S. 780-101 et seq., do not conflict with one another but can be read in harmony, one with the other.<sup>10</sup> As a result, there is no basis to dismiss count 2 nor suppress the blood result based upon this argument.<sup>11</sup>

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<sup>10</sup> See also *Commonwealth v. Waddell*, 61 A.3d 198 (Pa. Super. Ct. 2012).

<sup>11</sup> It should be noted, that Costa appears to concede this argument in his brief but does so without abandoning it for appellate review if necessary, having preserved it by raising it herein.

E. and F. LACK OF PROBABLE CAUSE TO REQUEST BLOOD TEST/BLOOD TESTS RESULTS NOT OBTAINED IN A LEGAL ACCEPTABLE MANNER

Lastly, Costa argues that McFeeley lacked probable cause to request that Defendant submit to a blood test and that due to the lack of probable cause, the resultant blood test results were not obtained in a legally acceptable manner. "To administer a blood test under §1547(a)(1) a police officer need only have reasonable grounds to believe that a person was driving under the influence of alcohol [or controlled substances]. Reasonable grounds have been interpreted to mean probable cause. *Commonwealth v. Jones*, 121 A.3d 524, 527-528 (Pa. Super. Ct. 2015). Thus, "probable cause exists when an officer has knowledge of sufficient facts and circumstances, gained through trustworthy information, to warrant a prudent man to believe that the person seized has committed a crime." *Commonwealth v. Kohl*, 615 A.3d 308, 315 (1992).

In the case *sub judice*, McFeeley testified that he observed pinpoint pupils, bloodshot and glass/watery eyes and eyelid tremors. McFeeley also testified that on one of the standard field sobriety tests, Costa exhibits two clues of impairment out of a possible eight. The totality of these circumstances, albeit "weak" to some objective observers, constitute reasonable grounds to allow McFeeley to request Costa to submit to a blood test. Thus,

we find that there was probable cause to request Costa to submit to a blood test and these tests were obtained in a locally acceptable manner.

**CONCLUSION**

Based upon the foregoing, we grant Costa's request to dismiss Count I, DUI - General Impairment (75 Pa.C.S.A. 3802(a)(1)), deny his request to dismiss Count II, DUI - Controlled Substance (75 Pa.C.S.A. §3802(D)(1)) and further deny his request to suppress the blood test results.

BY THE COURT:



Joseph J. Matika, J.

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