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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. CR 977-2017
	:	
JOSE JUAN ROSA,	:	
	:	
Defendant	:	

Seth E. Miller, Esquire — Counsel for Commonwealth
Assistant District Attorney

Matthew J. Rapa, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - September 13, 2018

Defendant Jose Juan Rosa's Omnibus Pre-Trial Motion now comes before the Court. As shall be delineated in detail herein, Defendant seeks to suppress as unconstitutional all evidence in this matter, including the identification of Defendant, all items seized and utilized as the basis for the prosecution, any inculpatory statements made by Defendant, and Defendant's blood taken during the blood draw attendant to this matter. For the reasons stated within this opinion, upon consideration of the Omnibus Pre-Trial Motion, after a hearing held thereupon, and after consideration of Defendant's Brief in Support of Motion to Suppress, Defendant's Motion is **DENIED**.

FACTUAL AND PROCEDURAL BACKGROUND

On May 18, 2017, at approximately 11:19 a.m., Pennsylvania State Police Trooper George Tessitore ("Trooper Tessitore") monitored westbound traffic on Interstate 80 while seated in a marked Pennsylvania State Police cruiser positioned stationary at mile marker 275.4 located in Kidder Township, Carbon County, Pennsylvania. The prevailing weather remained bright and clear at all times relevant to this matter.

While so monitoring a moderate traffic flow, Trooper Tessitore observed a 2005 Chrysler Town and Country minivan with New Jersey license plates (the "Town and Country") following too closely to the vehicle in front of it. He left his stationary position and commenced following the Town and Country westbound on Interstate 80, and continued to observe the Town and Country to be following too closely to the vehicle in front of it. Trooper Tessitore noted the vehicle in front of the Town and Country to be a dark gray sedan. Trooper Tessitore specifically found the Town and Country to be following too closely to the dark gray sedan at two different points - while he monitored traffic at the fixed position at mile marker 275.4 and while following the Town and Country at approximately mile marker 274. The Town and Country traveled below the posted sixty-five miles per hour speed limit at approximately fifty-five to sixty miles per hour, traveled less

than two seconds behind the dark gray sedan, and trailed the dark gray sedan by between one and one-half to two car lengths. Trooper Tessitore measured the amount of seconds by counting in a "one one thousand, two one thousand" cadence and noted that a car length in this case to be between ten and fifteen feet.[1]

During the time period in which he followed the Town and Country in his police cruiser, Trooper Tessitore could not always maintain visual contact with the dark gray sedan due to dark window tinting on the Town and Country. Similarly, the Pennsylvania State Police cruiser dashboard camera could not capture clearly an image of the dark gray sedan due to both the presence of dark window tinting on the Town and Country and the stationary, straight-ahead position of the dashboard camera.[2] Defendant Jose Juan Rosa ("Defendant" or "Mr. Rosa") now denies the existence of the dark gray sedan.

After following the Town and Country on Interstate 80 westbound, Trooper Tessitore activated his emergency lights and initiated a traffic stop at mile marker 272.8, East Side Borough,

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[1] Trooper Tessitore characterized his "one one thousand, two one thousand" counting method to be "fairly accurate." His car length measurements result from observing the distance between the rear bumper of the lead car and the front bumper of the following car. Trooper Tessitore customarily would stop a vehicle if it followed another vehicle by less than two seconds of his counting method. He remains mindful of an admonition contained in the Pennsylvania Driver's Manual that a minimum four-second time interval between vehicles constitutes a safe following distance.

[2] *See also* Pennsylvania State Police Mobile Video Recording ("MVR"), April 17, 2018 Suppression Hearing ("Suppression Hearing"), Joint Exhibit 1.

Carbon County, with the final stop occurring immediately past the bridge over the Lehigh River and beyond Exit 273 of westbound Interstate 80. In effectuating the vehicle stop, Trooper Tessitore positioned his state police cruiser immediately behind the Town and Country.[3]

Upon approaching the passenger side of the Town and Country on foot, Trooper Tessitore observed an individual sitting in the driver's seat and immediately detected a strong odor of marijuana coming from the interior of the vehicle. He made contact with the vehicle's driver, and, subsequent to requesting relevant documents, identified Defendant as the driver. Trooper Tessitore observed that Mr. Rosa had bloodshot eyes.

After Trooper Tessitore conveyed to Defendant the reason for the traffic stop, Defendant admitted to following too closely and also related that he should have known better than to follow too closely to vehicles in front of him because he worked as a truck driver. Trooper Tessitore conducted a record check and made all of the occupants exit the vehicle. Trooper Tessitore conducted a search of the vehicle - believing that he had probable cause to do so based upon the strong odor of marijuana. As a result of this search, he discovered a plastic bag containing a small amount of marijuana located under the driver's side seat. Upon inquiry from

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[3] *See* MVR, Suppression Hearing, Joint Exhibit 1.

Trooper Tessitore, Defendant stated that he had smoked marijuana prior to driving the Town and Country from New Jersey into Pennsylvania. Trooper Tessitore administered field sobriety tests during which Defendant exhibited signs of impairment.

Trooper Tessitore took Defendant into custody - handcuffed - for driving under the influence of a controlled substance to a degree that rendered Defendant incapable of safely operating the Town and Country. Trooper Tessitore transported Defendant to the Monroe County DUI Processing Center at the Monroe County Correctional Facility where he advised Defendant of the implied consent provisions existing in Pennsylvania Department of Transportation Form DL-26B ("Form DL-26B"). The Form DL-26B implied consent clause includes the following language that Trooper Tessitore read to Defendant and which notified Defendant that he could face civil penalties - but not enhanced criminal penalties - for failing to consent to a blood draw:

> "It is my duty as a police officer to inform you of the following:
>
> 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 at least 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 speak with an attorney or anyone else after being provided these warnings or you remain silent when asked to submit to a blood test, you will have refused the test.

See Form DL-26B, Suppression Hearing, Commonwealth Exhibit 1 (emphasis added). Upon conclusion of the reading by Trooper Tessitore, Defendant signed Form DL-26B and consented to have his blood drawn. Based upon this consent, a Monroe County Correctional Facility nurse drew a sample of Defendant's blood at 1:04 p.m. on May 18, 2017.

Trooper Tessitore caused the marijuana seized from the Town and Country operated by Defendant to be transported to the Pennsylvania State Police Fern Ridge Station in Blakeslee, Pennsylvania. A NIK [Narcotics Identification Test] test performed upon the seized material revealed presumptive positive results for marijuana.

Laboratory results prepared on May 31, 2017 indicated that the Defendant's blood drawn on May 18, 2017 tested positive for Delta-9 THC (Marijuana) and two marijuana metabolites.

Based upon the foregoing facts, Trooper Tessitore, on behalf of the Commonwealth of Pennsylvania, charged Defendant with one count each of Marijuana - Small Amount Personal Use (35 Pa.C.S.A. §780-113(a)(31)(i)), Use / Possession of Drug Paraphernalia (35

Pa.C.S.A. §780-113(a)(32)), Driving Under the Influence of Alcohol or Controlled Substance: Controlled Substance - Schedule 1 - 1st Offense (75 Pa.C.S.A. §3802(d)(1)(i)), Driving Under the Influence of Alcohol or Controlled Substance - Metabolite - 1st Offense (75 Pa.C.S.A. §3802(d)(1)(iii)), Driving Under the Influence of Alcohol or Controlled Substance - Impaired Ability - 1st Offense (75 Pa.C.S.A. §3802(d)(2)), and the summary offenses of Follow Too Closely (75 Pa.C.S.A. §3310(a)), and Careless Diving (75 Pa.C.S.A. §3714(a)).

DISCUSSION

I. OVERVIEW OF DEFENDANT'S CONSTITUTIONAL ARGUMENTS.

Defendant has filed an Omnibus Pre-Trial Motion composed of a bipartite Motion to Suppress.

A. Defendant's Claim of an Unconstitutional Vehicle Stop.

In one strain of argument set forth in the Omnibus Pre-Trial Motion, Defendant contends that Trooper Tessitore conducted an unlawful vehicle stop unsupported by the requisite reasonable suspicion or probable cause. Defendant contends accordingly that "Trooper Tessitore's stop of Defendant's vehicle constituted an investigatory seizure of Defendant, and this seizure occurred without any reasonable suspicion or probable cause [that] Defendant committed any violation of the vehicle code or was

involved in any criminal activity" and that "[t]he Commonwealth will be unable to carry its burden of proving Defendant's rights under the 4th and 14th Amendment of the United States Constitution and the Pennsylvania Constitution under Article I Section 8 were not violated by the stop of the vehicle and Trooper Tessitore's subsequent investigation and arrest of Defendant." *See* Omnibus Pre-Trial Motion at ¶16.[4] In his Brief in Support of Motion to Suppress, Defendant argues that "[t]he evidence offered to support Trooper Tessitore's claim that the Defendant was traveling too closely to the vehicle in front of him is at the crux of the issue currently before this Court." *See* Brief in Support of Motion to Suppress at 2.

B. Defendant's Claim of an Unconstitutional Blood Draw.

In the second strain of argument set forth in Defendant's Omnibus Pre-Trial Motion, Defendant contends that "[t]he [DL-26B] form provided to the Defendant did not list enhanced criminal penalties as a consequence of failing to consent to a blood draw," "[a]t the time of Defendant's arrest on May 18, 2017, enhanced criminal penalties for refusing to submit to a blood test were still part of 75 Pa.C.S.A. §3804(c)," "Defendant was not made aware

[4] The Commonwealth has not taken issue with Defendant's accompanying assertion that "Trooper Tessitore's stop of Defendant's vehicle constituted an investigatory seizure of Defendant..." As such, the Court shall assume such categorization to be accurate and undisputed for purposes of Defendant's motions.

of his rights to refuse against a warrantless search since he was not informed that the enhanced criminal penalties of 75 Pa.C.S.A. §3[8]04(c) could not be enforced," and "Defendant did not intentionally relinquish a known right or privilege when consenting to a blood draw as he was not informed that the enhanced criminal penalties of Section 3804(c) was (sic) unconstitutional." *See* Defendant's Omnibus Pre-Trial Motion at ¶¶10-13. Defendant thus contends that "[t]he search and seizure of defendant's blood was unreasonable, and therefore unconstitutional..." in that "Trooper Tessitore did not possess a warrant to obtain a blood sample from the Defendant" and that "Defendant's consent to the blood draw was involuntary under *Birchfield* and *Evans* because his consent was not informed that the enhanced criminal penalties would not be enforced." *See* Defendant's Omnibus Pre-Trial Motion at ¶14.[5]

Premised upon these assertions, Defendant contends that all evidence in this matter, including the identification of Defendant, all items seized and utilized as the basis for the prosecution, any inculpatory statements made by Defendant, and Defendant's blood taken during the blood draw attendant to this matter must be suppressed. *See generally* Defendant's Omnibus Pre-

[5] *See Birchfield v. North Dakota*, -- U.S. --, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016); *Commonwealth v. Evans*, 153 A.3d 323 (Pa.Super. 2016).

Trial Motion.

II. THE COMMONWEALTH'S BURDEN WHEN DECIDING SUPPRESSION OF EVIDENCE MOTIONS.

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.*

III. CONSTITUTIONALITY OF THE VEHICLE STOP.

A. Standards Governing Vehicle Stops.

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. 1979). "The Fourth Amendment of the United States Constitution and Article I, Section VIII of the Pennsylvania Constitution guarantee individuals freedom from

unreasonable searches and seizures." *Commonwealth v. El*, 933 A.2d 657, 660 (Pa.Super. 2007).

When analyzing the propriety of a vehicle stop, the Court must initially address whether the context of the stop necessitates that a police officer possess probable cause to effectuate the vehicle stop or if mere reasonable suspicion will suffice.[6]

More specifically, when a police officer believes a violation of the Pennsylvania Motor Vehicle Code (the "Motor Vehicle Code") has occurred:

> If reasonable suspicion exists, but a stop cannot further the purpose behind allowing the stop, the "investigative" goal as it were, it cannot be a valid stop. Put another way, if the officer has a legitimate expectation of investigatory results, the existence of reasonable suspicion will allow the stop - if the officer has no such expectations of learning additional relevant information concerning the suspected criminal activity, the stop cannot be constitutionally permitted on the basis of mere suspicion.

Commonwealth v. Chase, 960 A.2d 108, 115 (Pa. 2008).[7]

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[6] "[T]o establish grounds for reasonable suspicion, the officer must articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity. The question of whether reasonable suspicion existed at the time [the officer conducted the stop] must be answered by examining the totality of the circumstances to determine whether the officer who initiated the stop had a particularized and objective basis for suspecting the individual stopped. Therefore, the fundamental inquiry of a reviewing court must be an objective one, namely, whether the facts available to the officer at the moment of the [stop] warrant a [person] of reasonable caution in the belief that the action taken was appropriate." *See Commonwealth v. Basinger*, 982 A.2d 121, 125 (Pa.Super. 2009) (internal citations and quotation marks omitted; alterations in original).

[7] *See also Commonwealth v. Mack*, 953 A.2d 587, 589 (Pa.Super. 2008) (internal citations omitted)(Court notes that, "As provided for by statute [75 Pa.C.S.A.

"For a stop based on the observed violation of the Vehicle Code or otherwise non-investigable offense, an officer must have probable cause to make a constitutional vehicle stop." *See Commonwealth v. Calabrese*, 184 A.3d 164, 166 (Pa. 2018) (emphasis added) citing *Commonwealth v. Harris*, 176 A.3d 1009, 1019 (Pa.Super. 2017). In such situations, "[i]f the alleged basis of a vehicular stop is to permit a determination whether there has been compliance with the Motor Vehicle Code of this Commonwealth, it is encumbent (sic) upon the officer to articulate specific facts possessed by him, at the time of the questioned stop, ***which would provide probable cause to believe that the vehicle or the driver was in violation of some provision of the Code."*** *See Commonwealth v. Gleason*, 785 A.2d 983, 989 (Pa. 2001) (citations omitted) (emphasis in original).

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§6308(b)], anytime a police officer has "reasonable suspicion" to believe a violation of the Motor Vehicle Code is occurring or has occurred, the officer may initiate an investigatory vehicle stop," that "[i]ncident to this stop, an officer may check the vehicle's registration, the driver's license and obtain any information necessary to enforce provisions of the motor vehicle code," and that "[a]dditionally, police may request both drivers and their passengers to alight from a lawfully stopped car as a matter of right."). In this circumstance, the constitutional reasonableness of a traffic stop does not depend upon the actual motivations of the officer(s) involved, so long as specific facts have been articulated that would have given rise to a reasonable suspicion that the operator had committed a vehicle code violation. *See Commonwealth v. Chase* at 120.

Accordingly, in the instant case, the Commonwealth must demonstrate that it possessed probable cause by a preponderance of the evidence.

B. The Existence of Probable Cause in this Matter.

The Pennsylvania Supreme Court has defined probable cause as follows:

> Probable cause is made out when the facts and circumstances which are within the knowledge of the officer at the time of the stop, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime. The question we ask is not whether the officer's belief was correct or more likely true than false. Rather, we require only a ***probability***, and not a prima facie showing, of criminal activity. In determining whether probable cause exists, we apply a totality of circumstances test.

See Commonwealth v. Calabrese, 184 A.3d at 166-167 citing *Commonwealth v. Martin*, 101 A.3d 706, 721 (Pa. 2014) (internal citation omitted) (emphasis in original).

Section 3310(a) of the Motor vehicle Code provides:

> The driver of a motor vehicle shall not follow another vehicle more ***closely*** than is ***reasonable and prudent***, having due regard for the ***speed*** of the vehicles and the ***traffic*** upon and the ***conditions*** of the highway.

See 75 Pa.C.S.A. §3310(a) (emphasis added). [A] police officer's observations, without more, are legally sufficient to support a vehicle stop for a violation of Section 3310(a). *See Commonwealth v. Calabrese*, 184 A.3d at 167.

Over the past approximately two decades, the Superior Court, when evaluating potential violations of Section 3310(a), has placed unmistakable analytical primacy upon the distance between subject vehicles. Hence, in *Commonwealth v. Phinn*, where police observed the defendant "traveling less than a motorcycle-length distance behind a tractor-trailer on Interstate 80 where the vehicles' respective rates of speed were at or near the speed limit for that highway," the Superior Court, with no discussion of traffic or conditions, and a discussion of speed confined solely to noting that the subject vehicles proceeded at or near the speed limit, unequivocally pronounced that "the evidence clearly bespeaks a hazard within the contemplation of Section 3310(a)" and found the initial traffic stop to be lawful. *See Commonwealth v. Phinn*, 761 A.2d 176, 180 (Pa.Super. 2000).[8]

One year after deciding *Commonwealth v. Phinn*, the Superior

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[8] As the Superior Court explicitly acknowledged, its decision in *Commonwealth v. Phinn*, with its overarching emphasis upon vehicle distance, represented a divergence from the more multi-faceted Section 3310(a) analysis of the style which this Court, per Lavelle, P.J., had earlier undertaken in *Commonwealth v. Samuel*, 23 Pa. D&C 4th 29, 1995 WL 520694 (C.C.P. Carbon 1995), *aff'd* 671 A.2d 772 (Pa.Super. 1995)(table), a published decision of this Court that had been affirmed by the Superior Court in an unpublished memorandum. *See Commonwealth v. Phinn* 761 A.2d at 180. In *Commonwealth v. Samuel*, this Court found law enforcement testimony on behalf of the Commonwealth that related solely to observed distance between vehicles, in the absence of supporting evidence of "lack of control by the driver of defendants' vehicle," "traffic conditions," "the weather," and "conditions of the highway," to be inadequate to establish either probable cause - or even reasonable suspicion - for a vehicle stop. *See Commonwealth v. Samuel*, 1995 WL 520694 at *3 ("We hold that a suspected violation of section 3310(a) of the Vehicle Code requires more articulation than just 'traveling less than one car length' from another vehicle on the highway...").

Court, in *Commonwealth v. Bybel*, analyzed Section 3310(a) when presented with a factual context in which a "Honda coupe follow[ed] two to three feet behind a tractor trailer in the passing lane" of Interstate 80 when "both vehicles were traveling the posted sixty-five mile per hour speed limit in good driving conditions..." *See Commonwealth v. Bybel*, 779 A.2d 523, 524 (Pa.Super. 2001). In *Bybel*, the Superior Court confronted a solitary issue: "***Whether evidence of the proximity of Appellant's vehicle to the tractor, alone, was sufficient to support a conviction under Section 3301(a)?***" *See Id.* at 524 (emphasis added).

In resolving this issue, the Court determined that, as with the *Phinn* holding, "the evidence clearly bespeaks a hazard within the contemplation of Section 3310(a)," "[t]he same conclusion holds here, for the Commonwealth presented evidence that Appellant not only tailgated the tractor trailer, but also compromised safety on the Interstate in the process." *See Id.* at 524-525. The Court particularly emphasized relative vehicle proximity in noting that the appellant in that case "***could not have avoided a collision if the tractor trailer had cause to brake suddenly.***" *See Id.* at 525 (emphasis added).

Most recently, the Superior Court, in *Commonwealth v. Calabrese*, again emphasizing vehicle proximity, found probable cause to support a vehicle stop based upon a purported violation

of 75 Pa.C.S.A. §3310(a). In that case, the Superior Court confronted a factual narrative in which the offending vehicle traveled "at a high rate of speed," "got on the tail of another vehicle," and "was so close in proximity that the officer thought there as going to be an accident." *See Commonwealth v. Calabrese*, 184 A.3d at 167 (internal citations omitted).

In the instant matter, Trooper Tessitore observed Defendant's Town and Country to be traveling westbound on Interstate 80 below the posted sixty-five miles per hour speed limit at between fifty-five and sixty miles per hour speed limit and to be following the dark gray sedan too closely - once while he monitored traffic in a fixed position at mile marker 275.4 and again while following the Town and Country at approximately mile marker 274. He measured the distance of one and one-half to two vehicle lengths between the vehicles involved by both visual and temporal observation.[9]

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[9] Defendant, in both his Brief in Support of Motion to Suppress and at the April 17, 2018 hearing, and after proffering supporting mathematical calculations, argues *inter alia* that "[s]ince both cars were being operated at the same approximate speed of 60 mph and it took the Defendant between one and two seconds to pass the same marker as the lead vehicle, there would be as much as 176 feet or as little as 88 feet between the vehicles." *See* Brief in Support of Motion to Suppress at 7. The Court recognizes that Trooper Tessitore's time estimate - based upon his counting in a "one one thousand two one thousand" fashion - to be, as Trooper Tessitore characterized it, "fairly accurate." Nonetheless, such time estimate still possesses both a degree of imprecision and a possible margin of error. Neither the Commonwealth nor Defendant presented any evidence with respect to the extent, if any, of such margin of error. Insofar as this potentially inexact time estimate, along with a potentially inexact estimate of vehicle speeds, constitute the twin foundations that undergird Defendant's mathematical analysis, the Court finds the results of Defendant's calculation to be unpersuasive. The Court, in assessing relative vehicle proximity, finds most credible, and places greatest weight upon, Trooper

Given the foregoing, Trooper Tessitore initiated the subject vehicle stop.

Based upon review of the record evidence and the applicable law, the Court finds Trooper Tessitore's testimony credible and the Commonwealth's evidence to be sufficient to establish probable cause for Trooper Tessitore to believe that Defendant in this matter followed another vehicle more closely than is reasonable and prudent, for Trooper Tessitore to conduct a vehicle stop, and for Trooper Tessitore to charge Defendant, *inter alia*, with violation of Section 3310(a) of the Motor Vehicle Code.

Trooper Tessitore's observations, which provide sufficient basis to justify a vehicle stop, alarmed him to the extent that he left a stationary monitoring position to pursue Defendant's Town and Country. The Court finds, as Trooper Tessitore concluded, that the distance between Defendant's Town and Country and the dark gray sedan - at most the thirty feet afforded by two car lengths - not to be reasonable and prudent. In so concluding, the Court, as it finds that Trooper Tessitore did, gives due regard to the estimated fifty-five to sixty mile an hour vehicle speed, the moderate traffic conditions, and the bright and clear weather conditions extant in this case. Under the unique facts and

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Tessitore's visual observation of a distance of one and one-half to two car lengths between the subject vehicles.

circumstances of this case, the Court does not believe an "at most" thirty foot following distance to provide an opportunity to avoid a collision in the event that the lead vehicle suddenly stopped or slowed down or otherwise had cause to brake suddenly. The Court finds that the evidence in this case clearly bespeaks a hazard within the contemplation of Section 3310(a) and the initial traffic stop to be lawful

Defendant's suppression motion based upon an improper vehicle stop shall be denied.

IV. CONSTITUTIONALITY OF THE BLOOD DRAW - VOLUNTARINESS OF DEFENDANT'S CONSENT.

Every citizen has a right to freedom from unreasonable searches and seizures. U.S. CONST. Amend. IV; PA. CONST. Art. I, § 8. A blood draw constitutes a search within the ambit of both the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. *See Birchfield v. North Dakota*, -- U.S. --, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016); *Commonwealth v. Smith*, 77 A.3d 562, 566 (Pa. 2013).

In the absence of a warrant exception, the Fourth Amendment does not permit warrantless blood tests incident to arrests for impaired driving. *See Birchfield v. North Dakota*, 136 S.Ct. at 2184. "One of the standard exceptions to the warrant requirement is consent, either actual or implied." *Commonwealth v. March*, 154

A.3d 803, 808 (Pa.Super. 2017) (citation omitted).[10] In its landmark June, 2016 decision, the United States Supreme Court, in *Birchfield v. North Dakota*, straightforwardly held that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *See Birchfield v. North Dakota*, 136 S.Ct. at 2186.[11]

Approximately one week after the issuance of the *Birchfield* opinion, also in June, 2016, PennDOT, as a result of requests from both the Pennsylvania District Attorneys Association and numerous county district attorneys, revised its Form DL-26 pertaining to chemical blood testing warnings to eliminate warnings required by 75 Pa.C.S.A. §3804 that "theretofore informed individuals suspected of DUI that they would face enhanced criminal penalties if they refused to submit to a blood test." *See Commonwealth v. Robertson*, 186 A.3d at 442 n.1, 444. In the case now before this Court, Trooper Tessitore read to Defendant PennDOT's revised form, formally known as Form DL-26B.

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[10] "Exceptions to the warrant requirement include the consent exception, the plain view exception, the inventory search exception, the exigent circumstances exception, the automobile exception ..., the stop and frisk exception, and the search incident to arrest exception." *See Commonwealth v. Evans*, 153 A.3d at 328 citing *Commonwealth v. Dunnavant*, 63 A.3d 1252, 1257 n.3 (Pa.Super. 2013).

[11] "In *Birchfield*, the Supreme Court of the United States held that criminal penalties imposed on individuals who refuse to submit to a warrantless blood test violate the Fourth Amendment (as incorporated into the Fourteenth Amendment)." *See Commonwealth v. Robertson*, 186 A.3d 440, 444 (Pa.Super. 2018) citing *Birchfield v. North Dakota*, 136 S.Ct. at 2185-2186.

The Superior Court, subsequent to *Birchfield*, held that the Form DL-26 warnings read to defendants prior to the June, 2016 revisions became partially inaccurate as a result of the *Birchfield* holding. *See Commonwealth v. Evans*, 153 A.3d at 331 ("Since *Birchfield* held that a state may not 'impose criminal penalties on the refusal to submit to [a warrantless blood] test,' the police officer's advisory to [a]ppellant [that refusal to submit to the test could subject appellant to more severe penalties set forth in 75 Pa.C.S.A. §3804(c)] was partially inaccurate."). "Thus, when evaluating whether a defendant's consent to a blood draw was voluntary or involuntary, trial courts are required to consider whether the defendant was given accurate information regarding the criminal consequences of refusing to submit to a blood test." *See Commonwealth v. Robertson*, 186 A.3d at 444 (citations omitted).[12]

Whereas PennDOT revised its Form DL-26 pertaining to chemical blood testing warnings to eliminate warnings required by 75 Pa.C.S.A. §3804 within approximately one week of the *Birchfield* decision, legislative action in Pennsylvania to conform 75 Pa.C.S.A. to *Birchfield* did not occur with equal rapidity. "On July 20, ***2017***, Governor Thomas W. Wolf signed into law Act 30 of

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[12] The Superior Court subsequently held that, as a result of *Birchfield*, the imposition of enhanced criminal penalties premised upon the failure to consent to a blood draw constitutes an illegal sentence. *See Commonwealth v. Giron*, 155 A.3d 635, 639 (Pa.Super. 2017).

2017 which amended 75 Pa.C.S.A. §3804 to comport with *Birchfield*." *See Commonwealth v. Robertson*, 186 A.3d at 445. Through Act 30, the Pennsylvania legislature amended 75 Pa.C.S.A. §3804 so as to provide for enhanced criminal penalties for persons who refuse submission to blood draws ***only*** when police have obtained a search warrant for such blood. *See* 75 Pa.C.S.A. 3804(c). Accordingly, PennDOT's Form DL-26B has reflected the state of statutory law - as opposed to judicial law - only from July 20, 2017 onward. From June, 2016 through July, 2017, and including the time of Defendant's May 18, 2017 arrest, PennDOT's "DL-26B form warnings were consistent with the law as interpreted by the Supreme Court of the United States and [the Pennsylvania Superior] Court but inconsistent with the (unconstitutional) provisions of Title 75." *See Commonwealth v. Robertson*, 186 A.3d at 445.

Defendant partially grounds his suppression motion in the existence of this anomalous legal phase of Form DL-26B's existence. He contends that "[d]efendant's consent to the blood draw was involuntary under *Birchfield* and *Evans* because his consent was not informed that the enhanced criminal penalties would not be enforced." *See* Omnibus Pre-Trial Motion at ¶14(b). Whereas *Birchfield* in part held that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense," *see Birchfield v. North Dakota*, 136 S.Ct. at

2186, Defendant would have this Court hold that motorists cannot be deemed to have consented to a blood test if police ***do not*** advise putative defendants of criminal penalties that they ***do not*** face.

The Superior Court squarely rejected the argument proffered by Defendant herein in *Commonwealth v. Robertson*, 186 A.3d 440 (Pa.Super. 2018). In rejecting the "contention that the police had an affirmative duty to inform Appellee that she had a right to refuse a blood test without risking enhanced criminal penalties," the Superior Court first noted Pennsylvania Supreme Court guidance that "the investigating character and fluid nature of searches and seizures render rules that require detailed warnings by law enforcement simply unfeasible." *See Commonwealth v. Robertson*, 186 A.3d at 447 citing *Commonwealth v. Smith*, 77 A.3d 562, 571 (Pa. 2013). The Superior Court then reasoned that "[i]t would be unfeasible to require police to inform individuals of current legal developments prior to conducting a search or seizure" and concluded that "police did not have an affirmative duty to inform Appellee that she could refuse a blood test without risking harsher criminal penalties." *See Id.* at 447.

Additionally, the Superior Court in *Robertson* reasoned that courts in Pennsylvania generally presume a defendant to be aware of the law, including both statutory law and judicial pronouncements. *See Id.* at 446-447. The Superior Court in

Robertson also relied on an earlier Superior Court holding that "*Birchfield* is inapplicable since appellant was read the revised DL-26B form and, therefore, never advised that she would be subject to enhanced criminal penalties if she refused to submit to a blood test."). *See Id.* at 447 citing *Commonwealth v. Smith*, 177 A.3d 915, 921-922 (Pa.Super. 2017).

For each of these reasons, *Commonwealth v. Robertson* compels the rejection of Defendant's argument that he did not voluntarily consent to a blood draw because Trooper Tessitore did not inform him that the enhanced criminal penalties would not be enforced.

Having disposed of Defendant's argument concerning the propriety of the chemical blood test warning rendered to Defendant in this matter, the Court holds that Defendant voluntarily consented to the blood draw that occurred in this case.

The Commonwealth bears the burden of proving that a defendant voluntarily consented to a warrantless search. *See Commonwealth v. Acosta*, 815 A.2d 1078, 1083 (Pa.Super. 2003). Under *Evans*, when deciding if a defendant voluntarily consented to a blood draw, a trial court must consider the totality of circumstances. *See Commonwealth v. Evans*, 153 A.3d at 328. The Pennsylvania Supreme Court has described the totality of circumstances analysis thusly: "[w]hile there is no hard and fast list of factors evincing voluntariness, some considerations include: 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 to consent; 4) the defendant's education and intelligence; 5) the defendant's belief that no incriminating evidence will be found; and 6) the extent and level of the defendant's cooperation with the law enforcement personnel." *See Commonwealth v. Gillespie*, 821 A.2d 1221, 1225 (Pa. 2003) citing *Commonwealth v. Cleckly*, 738 A.2d 427, 433 n.7 (Pa. 1999).

Application of the foregoing criteria results in the irrefutable conclusion that Defendant herein voluntarily consented to his blood draw. In this matter, Trooper Tessitore had Defendant in custody. Thus the first factor weighs against a finding of voluntariness. Trooper Tessitore did not utilize coercive tactics nor does the record indicate that he placed Defendant under duress. Thus the second factor weighs in favor of voluntariness. Trooper Tessitore properly advised Defendant of his right to refuse a blood draw. Hence the third factor weighs in favor of a finding of voluntariness. Neither the Commonwealth nor Defendant elicited direct evidence pertaining to Defendant's education and intelligence or his awareness that incriminating evidence would be found in his blood. Thus the fourth and fifth factors stand as neutral. Finally, Defendant cooperated fully with Trooper Tessitore, so the last factor weighs in favor of voluntariness.

Insofar as only Defendant's custodial status weighs against a finding of voluntariness, the Court finds that Defendant voluntarily consented to the blood draw in this matter.

V. CONCLUSION.

Based upon the foregoing, the Court enters the following order:

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. CR 977-2017
	:	
JOSE JUAN ROSA,	:	
	:	
Defendant	:	

Seth E. Miller, Esquire — Counsel for Commonwealth
Assistant District Attorney

Matthew J. Rapa, Esquire — Counsel for Defendant

ORDER OF COURT

AND NOW, this 13th day of September, 2018, upon consideration of Defendant Jose Juan Rosa's Omnibus Pre-Trial Motion filed on February 16, 2108, after hearing held in this matter on April 17, 2018, and upon consideration of Defendant Jose Juan Rosa's Brief in Support of Motion to Suppress filed on April 24, 2018, it is hereby **ORDERED** and **DECREED** that Defendant Jose Juan Rosa's Omnibus Pre-Trial Motion is **DENIED**.

BY THE COURT:

JOSEPH J. MATIKA, J.