

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

COMMONWEALTH OF PENNSYLVANIA :
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 vs. : No. 509 CR 2014
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 APRIL MAE BANAVAGE, :
 Defendant :
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Criminal Law - Driving under the Influence - Warrantless Blood
Draw - Implied/Actual Consent - Effect of Refusal
- Birchfield - Totality of the Circumstances

1. The warrantless taking of a blood draw from a driver arrested for driving under the influence constitutes a search subject to the protections of the Fourth Amendment of the United States Constitution, as well as Article I, Section 8 of the Pennsylvania Constitution, against unreasonable searches and seizures.
2. In general, a search or a seizure is unreasonable unless conducted pursuant to a valid search warrant upon a showing of probable cause, or unless an established exception to the warrant requirement applies.
3. Under Pennsylvania's Implied Consent Law, if a driver who has been lawfully arrested for driving under the influence refuses to submit to chemical testing of his breath or blood upon request of the arresting officer, he is subject to enhanced criminal penalties if he is later convicted of violating Section 3802(a)(1) of the Vehicle Code relating to general impairment due to alcohol consumption.
4. In Birchfield, the United States Supreme Court held that implied consent laws that impose criminal penalties on drivers who refuse to submit to a blood test violate the Fourth Amendment of the United States Constitution and that implied consent to a blood test cannot lawfully be based on the threat of enhanced criminal penalties if a requested blood test is refused.
5. In Birchfield, the United States Supreme Court held that consent to a blood draw after a driver is inaccurately advised that a refusal may result in criminal penalties is not *per se* invalid, but is a factor to be considered in evaluating whether the driver's consent was voluntary under the "totality of all the circumstances."

6. For a consent to a search to be valid, it must be unequivocal, specific and voluntary. Voluntariness requires a showing by the Commonwealth that the consent was the product of an essentially free and unrestrained choice - not the result of duress or coercion, express or implied.
7. After being advised that her refusal to submit to chemical testing of her blood would subject her to increased criminal penalties if she were convicted of driving under the influence, general impairment, alcohol-related, Defendant consented to the test. Defendant's consent was held to be voluntary under the totality of the circumstances: no odor of alcohol was detected on Defendant's breath; Defendant's admission to the arresting officer that she was taking prescription medication and had a neurological condition; an evaluation by a drug recognition expert who opined that Defendant was under the influence of a controlled substance and that a blood draw should be obtained; Defendant's statement to the arresting officer before being advised of the consequences of a refusal that she was agreeable to a blood test and wanted to cooperate; and the absence of evidence that Defendant's consent to a blood test was improperly affected or influenced in any manner by the criminal consequences of which she was advised - as opposed to the civil and evidentiary consequences - of her refusal.

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COMMONWEALTH OF PENNSYLVANIA

vs.

APRIL MAE BANAVAGE,
Defendant

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No. 509 CR 2014

Brian B. Gazo, Esquire
Assistant District Attorney

Counsel for Commonwealth

Katherine E. McShane, Esquire

Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. - March 16, 2017

In Pennsylvania the right to drive is subject to "implied consent": the statutory requirement that a driver who is arrested for driving under the influence must, upon request, submit to chemical testing of his breath or blood for the purpose of determining the alcoholic content of blood or the presence of a controlled substance, failing which various civil, criminal, and evidentiary sanctions may be imposed. 75 Pa.C.S.A. § 1547(a)(1), (b)(1), (b)(2)(i-ii). This condition on the right to drive was severely curtailed in Birchfield v. North Dakota, ___ U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), where the United States Supreme Court held, *inter alia*, that implied consent laws which impose criminal penalties on the refusal to submit to a warrantless blood test requested in accordance with such laws violate, as a matter of law, the

Fourth Amendment's prohibition against unreasonable searches by impermissibly infringing upon the individual's right to refuse a warrantless search of his blood. Birchfield, 136 S.Ct. at 2186. At the same time, the Supreme Court held, albeit implicitly, that a driver's actual or express consent to a blood draw was not *per se* invalid, notwithstanding the threat of criminal consequences for a refusal, and that the voluntariness of such consent needed to be "determined from the totality of all the circumstances." Birchfield, 136 S.Ct. at 2186. This question of fact is the issue now before us.

FACTUAL AND PROCEDURAL BACKGROUND

On January 7, 2016, at approximately 8:40 A.M., April M. Banavage ("Defendant") was driving north on State Route 209 in Carbon County when she was stopped by Pennsylvania State Trooper Mark Bower for erratic driving. The legality of this stop is not in question.

Trooper Bower approached the driver's side of Defendant's vehicle and requested to see Defendant's driver's license, vehicle registration, and proof of insurance. In responding to this request, Defendant moved slowly and appeared to Trooper Bower to be extremely tired and out of it. Upon exiting her vehicle, Defendant was unsteady and had difficulty maintaining her balance. No odor of alcohol was detected on Defendant's breath.

Various field sobriety tests were administered to Defendant, the results of which led Trooper Bower to suspect Defendant was under the influence of a controlled substance. Contributing to this belief was Defendant's statement to Trooper Bower that she was taking prescription medication and had a neurological disorder. Thereupon, Trooper Bower contacted Sergeant Shawn Noonan of the Pennsylvania State Police and was advised to transport Defendant to the Lehighton barracks for evaluation by a drug recognition expert. After this evaluation was completed, Trooper Bower was further advised to take Defendant to the Lehighton Hospital for a blood draw.

While en route to the hospital, Trooper Bower explained to Defendant where they were going and why: to have Defendant's blood chemically tested subject to her agreement to a blood draw. Defendant agreed to submit to the test and stated she would cooperate.

At the hospital, Trooper Bower read the following language from Form DL-26 (3-12) to Defendant verbatim:

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 (blood, breath or urine. Officer chooses the chemical test).

3. If you refuse to submit to the chemical 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. In addition, if you refuse to submit to the chemical test, and you are convicted of violating Section 3802(a)(1) (relating to impaired driving) of the Vehicle Code, then, because of your refusal, you will be subject to more severe penalties set forth in Section 3804(c) (relating to penalties) of the Vehicle Code. These are the same penalties that would be imposed if you were convicted of driving with the highest rate of alcohol, which include a minimum of 72 consecutive hours in jail and a minimum fine of \$1,000.00, up to a maximum of five years in jail and a maximum fine of \$10,000.
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 chemical testing, you will have refused the test.

(Suppression Hearing, Commonwealth Exhibit No.1).

Trooper Bower testified that as he read the above warnings to the Defendant, she appeared to understand what was read and had no questions. Defendant then signed the form where indicated and agreed to the blood draw. No warrant was obtained prior to taking Defendant's blood. The results of this test were positive and, on February 16, 2016, Defendant was criminally charged with driving under the influence - presence of a metabolite of a controlled substance (75 Pa.C.S.A. §

3802(d)(1)(iii)) and driving under the influence of a controlled substance - general impairment (75 Pa.C.S.A. § 3802(d)(2)), together with various summary moving violations.

On July 11, 2016, Defendant filed an Omnibus Pretrial Motion seeking to suppress the blood results as being obtained in violation of her Fourth Amendment rights and without valid consent, relying principally on the Birchfield decision. A hearing on this motion was held on January 24, 2017. At this hearing, Defendant did not testify. The only testimony presented was that of Trooper Bower called by the Commonwealth.

DISCUSSION

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. The taking of blood constitutes a search subject to the protections of the Fourth Amendment, as well as Article I, Section 8 of the Pennsylvania Constitution. Commonwealth v. Smith, 77 A.3d 562, 566 (Pa. 2013); Birchfield, 136 S.Ct. at 2173.¹

"Generally, a search or a seizure is unreasonable unless conducted pursuant to a valid search warrant upon a showing of probable cause." Commonwealth v. March, ___ A.3d ___, ___ 2017 WL 371479, *4 (Pa.Super. Jan. 26, 2017) (citation and quotation

¹ See also Commonwealth v. Funk, 385 A.2d 995, 1000 (Pa.Super. 1978) (noting that "blood samples are not testimonial evidence and come under the protection of the [F]ourth, not the [F]ifth, [A]mendment . . . and therefore do not get Miranda protection.").

marks omitted). "Since the blood test in the case at bar was performed without a warrant, the search is presumptively unreasonable and therefore constitutionally impermissible, unless an established exception applies." Commonwealth v. Evans, ___ A.3d ___, ___ 2016 WL 7369120, *4 (Pa.Super. Dec. 20, 2016). "One of the standard exceptions to the warrant requirement is consent, either actual or implied." March, *supra* at *4 (citation omitted).

The sole issue presented in this case is whether Defendant voluntarily consented to the blood draw requested by Trooper Bower or whether her consent was coerced and involuntary. In the context of a suppression motion, the Commonwealth bears both the burden of production and burden of persuasion by a preponderance of the evidence that the challenged evidence was lawfully obtained and is admissible. Commonwealth v. Enimpah, 62 A.3d 1028, 1031 (Pa.Super. 2013), *affirmed*, 106 A.3d 695, 701 (Pa. 2014); Evans, *supra* at *3; Pa.R.Crim.P. 581(H). It is the state's burden to prove consent.

In order for a consent to search to be valid, it must be unequivocal, specific, and voluntary. Commonwealth v. Acosta, 815 A.2d 1078, 1083 (Pa.Super. 2003) (*en banc*), *appeal denied*, 839 A.2d 350 (Pa. 2003).

In connection with the inquiry into the voluntariness of a consent given pursuant to a lawful encounter, 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. While knowledge of the right to refuse to consent to the search is a factor to be taken into account, the Commonwealth is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. 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.

Since both the tests for voluntariness and for a seizure centrally entail an examination of the objective circumstances surrounding the police/citizen encounter to determine whether there was a show of authority that would impact upon a reasonable citizen-subject's perspective, there is a substantial, necessary overlap in the analyses.

* * *

[Thus, we] conclude that the following factors ... are pertinent to a determination of whether consent to search is voluntar[ily] given: 1) the presence or absence of police excesses; 2) whether there was physical contact; 3) whether police directed the citizen's movements; 4) police demeanor and manner of expression; 5) the location of the interdiction; 6) the content of the questions and statements; 7) the existence and character of the initial investigative detention, including the degree of coerciveness; 8) whether the person has been told that he is free to leave; and 9) whether the citizen has been informed that he is not required to consent to the search.

Commonwealth v. Powell, 994 A.2d 1096, 1101-1102 (Pa.Super. 2010) (quoting Commonwealth v. Kemp, 961 A.2d 1247, 1261

(Pa.Super. 2008) (*en banc*)), *appeal denied*, 13 A.3d 477 (Pa. 2010).

"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. Smith, 77 A.3d at 573 (quoting Commonwealth v. Reid, 811 A.2d 530, 549 (Pa. 2002)). "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." *Id.*

The key concern is whether the consent was voluntarily given and not the product of coercion or duress. Commonwealth v. Cleckley, 738 A.2d 427, 430 (Pa. 1999). This is a question of fact to be determined by the totality of the circumstances. *Id.* Under this standard, "no one fact, circumstance, or element of the examination of a person's consent has talismanic significance." Smith, 77 A.3d at 569. "[W]hile knowledge of the right to refuse consent is a factor to consider in determining whether consent to search was voluntarily and knowingly given, it is not dispositive." Cleckley, 738 A.2d at 430 ("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."); see also Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973) (same).

Here, Defendant was correctly advised that she was under arrest for driving under the influence of alcohol or a controlled substance; that if she refused the requested chemical test of her blood, her license would be suspended; and that she had no right to consult with an attorney before deciding whether to submit to testing. She was also advised - in hindsight, incorrectly, based on the June 23, 2016 Birchfield decision - that if she refused a chemical test of her blood and was subsequently convicted of violating Section 3802(a)(1) (relating to impaired driving) of the Vehicle Code, she would be subject to the enhanced criminal penalties set forth in Section 3804(c) (relating to penalties) of the Vehicle Code, the same penalties which apply to motorists convicted of driving with the highest rate of alcohol. Significantly, Pennsylvania's enhanced criminal penalties for persons who refuse a requested blood test and are then convicted of violating Section 3802(a)(1) apply only to motorists convicted of driving under the influence of alcohol, general impairment: they are inapplicable to individuals such as the Defendant whose violation consists of having any amount of a metabolite of a prohibited controlled substance in their blood or whose impairment is caused by any

drug or combination of drugs, and who, by virtue of such violation, are automatically subject to the penalties described in Section 3804(c).² The question then becomes whether Defendant was misled by this later warning.³ See Commonwealth v. Wright, 190 A.2d 709, 711 (Pa. 1963) (Consent for a search "may not be gained through stealth, deceit or misrepresentation, and that if such exists this is tantamount to implied coercion.").

Under the evidence presented at the suppression hearing, before Trooper Bower requested a blood test it appeared likely that Defendant's impairment was caused by one or more controlled substances, not alcohol. At the time of Defendant's traffic stop, notwithstanding Defendant's erratic driving, Trooper Bower's observations of Defendant's sluggishness and unsteadiness while standing, and the results of the field sobriety tests, Trooper Bower detected no odor of alcohol. (Suppression Hearing, Commonwealth Exhibit No.2 - Intoxication Worksheet). To this must be added that at the scene, Defendant advised Trooper Bower she had a neurological disorder and was taking prescription medication. Finally, while still at the

² Specifically, Section 3802(a)(1) under the subtitle of "general impairment" prohibits an individual from driving a vehicle "after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving. . . the vehicle." 75 Pa.C.S.A. § 3802(a)(1).

³ In this respect no evidence was presented as to Defendant's knowledge or experience relative to Pennsylvania's driving under the influence laws, and Defendant never testified that she was deceived or misled by the reference in the DL-26 Form to a conviction under Section 3802 (a)(1) of the Vehicle Code as the trigger for imposing enhanced criminal penalties if she refused to submit to a blood test.

scene, Trooper Bower was in contact with a drug recognition expert, Sergeant Noonan, who advised Trooper Bower to have a drug recognition evaluation performed. Only after this occurred was Trooper Bower advised to take Defendant to the hospital for a blood draw.

It was in the face of this information that Trooper Bower transported Defendant to the Lehighton Hospital for a blood test. The results of that test disclosed the presence of approximately five depressants and ecstasy in Defendant's system. No alcohol was discovered, a fact Defendant must have anticipated when the DL-26 form was read to her and she agreed to the blood draw.

Under these circumstances, it is likely the partial defect in the DL-26 form was inconsequential to Defendant's decision to consent to the blood draw and did not influence that decision. Supporting this conclusion is the restrained and respectful manner with which Trooper Bower treated Defendant, explaining to her what was going on and why he was taking her to the hospital, and Defendant agreeing to the draw before she arrived at the hospital and the DL-26 form was read to her.

That Defendant's consent was freely given and uncoerced is supported not only by Trooper Bower's manner of interacting with Defendant, but also by Defendant's willingness to cooperate. There is no evidence of a show of force, unusual commands,

aggressive behavior, or any use of language or tone by Trooper Bower that was not commensurate with the circumstances. Nor is there any evidence to suggest that Trooper Bower's request for Defendant to submit to a blood test was a command or a directive.

And while it is true that Defendant was in custody at the time her consent was given, a factor which must be taken into account, this factor is not controlling and is outweighed here by Defendant knowing the test was being requested for criminal or prosecutorial purposes and having been advised via Officer Bower's reading of the DL-26 Form that she had a right to refuse testing. See Commonwealth v. Rosas, 875 A.2d 341, 350 (Pa.Super. 2005) (collecting cases finding consent voluntary notwithstanding that defendant was under arrest and handcuffed at the time), *appeal denied*, 897 A.2d 455 (Pa. 2006); Smith, *supra* at 574, 578 (analyzing whether a consent must be both knowing and voluntary, the majority apparently concluding that "a defendant's knowledge of the possible use of blood test results in a subsequent criminal prosecution against him is a required, rather than merely a relevant, factor in an assessment of voluntary consent" and the dissent concluding that a defendant's "knowledge (whether actual or 'objective') of the criminal investigative purposes of a search may certainly be a relevant factor in determining the voluntariness of consent, but

is not a necessary one"). That Defendant possessed the requisite knowledge to understand the criminal implications of her consent is objectively readily apparent from the evidence: she was coherent throughout her interactions with Trooper Bower, she was uninjured (eliminating the possibility that the blood draw was for medical purposes), there was no vehicle accident (eliminating the possibility that the blood draw was part of a routine accident investigation), and she was under arrest. Given these factors, Defendant knew or should have known the purpose of the chemical test of her blood was to determine if she was under the influence for prosecutorial purposes. Overall, we find that Defendant's consent was voluntarily given as it was "the product of an essentially free and unconstrained choice." Commonwealth v. Strickler, 757 A.2d 884, 901 (Pa. 2000).

CONCLUSION

Notwithstanding the partial inaccuracy of the DL-26 warning given to Defendant, the error was harmless in the sense it was factually inapplicable to Defendant's circumstances and, under the totality of the circumstances, was not evidenced to have influenced Defendant's decision to submit to a warrantless blood test. Accordingly, Defendant's Motion to Suppress the blood that was taken from her at the hospital and the results of the blood alcohol test will be denied.

BY THE COURT:

P.J.