

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

COMMONWEALTH OF PENNSYLVANIA :

v. :

NO. 843-CR-2016

RICHARD ALLEN BOYD, JR., :

Defendant :

Brian B. Gazo, Esquire
Asst. District Attorney

Counsel for the Commonwealth

Richard Q. Hark, Esquire

Counsel for the Defendant

MEMORANDUM OPINION

Serfass, J. - June 28, 2017

Defendant, Richard Allen Boyd, Jr., (hereinafter "Defendant") brings before this Court a "Motion to Suppress" seeking suppression of his blood, and the toxicology analysis thereof, as fruit of a poisonous tree. Because we find that Defendant gave voluntary and knowing consent to have his blood drawn, we will deny Defendant's motion.

FACTUAL AND PROCEDURAL HISTORY

On April 12, 2016, Defendant was travelling westward on Pennsylvania State Route 248, in the Borough of Bowmanstown when he was stopped by Trooper Jonathan Lazarchick of the Pennsylvania State Police. Prior to initiating the traffic stop, Trooper Lazarchick observed Defendant's vehicle travelling in both lanes and then fail to activate it's turn signal when switching lanes.

When Trooper Lazarchick asked Defendant to produce his driver's license, registration and proof of financial responsibility, Defendant did not produce his driver's license, claiming that he had left it at home. When asked why he was weaving in and out of the lanes of traffic, Defendant replied that he was checking to ensure it was safe to pass the vehicle in front of him. At this point, the trooper observed Defendant's speech to be slow, slurred, and confused. When asked, Defendant told the trooper that due to issues with his back, he took Oxycodone and Xanax, for which he had prescriptions. Defendant was then asked to perform field sobriety tests which he failed. After placing Defendant under arrest and transporting him to the Pennsylvania State Police barracks in Lehighton for a drug recognition evaluation, Trooper Lazarchick transported Defendant to Gnaden Huetten Memorial Hospital for a blood draw. Defendant was read the PennDOT DL-26 form advising him of his implied consent and O'Connell warnings. Defendant then consented to the blood draw which was performed approximately two and a half hours after the initial stop made by Trooper Lazarchick.

Defendant was ultimately charged with the follow offenses:

1. DUI: Controlled Substance - Schedule II or III, 75 Pa. C.S.A. §3802(d)(1)(ii);
2. DUI: Controlled Substance - Impaired Ability - 1st Offense, 75 Pa. C.S.A. §3802(D)(2);

3. Failure to Carry License, 75 Pa. C.S.A. §1511(A);
4. Disregard Traffic Lane (Single), 75 Pa. C.S.A. §3309(1);
5. Turning Movements and Required Signals, 75 Pa. C.S.A. §3334(A);
6. Careless Driving, 75 Pa. C.S.A. §3714(A); and
7. Violate Hazard Regulation, 75 Pa. C.S.A. §3736(A).

On October 11, 2016, Defendant filed a "Motion to Suppress" averring that the Commonwealth's search and seizure of Defendant's blood was unconstitutional pursuant to the Fourth Amendment of the United States Constitution as interpreted by the United States Supreme Court decision in Birchfield v. North Dakota, -- U.S. --, 136 S.Ct. 2160 (2016). Defendant therefore seeks to suppress his blood and the toxicological analysis thereof.

A hearing on Defendant's motion was held before this Court on December 15, 2016. Following testimony and extensive oral argument, Defendant filed a brief in support of his motion on February 13, 2017, and the Commonwealth filed a brief in opposition on February 27, 2017.

DISCUSSION

The sole issue before this Court is whether Defendant's consent to the blood draw was voluntary or coerced by the threat of enhanced penalties included in the DL-26 form.¹

¹ Defendant's suppression motion raised an issue with the blood draw being performed approximately two and a half hours after the initial traffic stop, but no further argument was made on this matter and even if there had

The Fourth Amendment of the United States Constitution prohibits the government from performing unreasonable searches and seizures. U.S. Const. amend. IV; Pa. Const. art. I, §8. A blood draw is considered a search pursuant to the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution. Birchfield v. North Dakota, 136 S.Ct. 2160, 2173 (2016); Commonwealth v. Smith, 77 A.3d 562, 566 (Pa. 2013).

Generally, a search and/or seizure is deemed unreasonable unless a valid search warrant is obtained from an independent judicial officer based on a sufficient showing of probable cause. Commonwealth v. Gary, 91 A.3d 102, 107 (Pa. 2014). However, a warrantless search or seizure may still be constitutional if an established exception applies. Commonwealth v. Evans, 153 A.3d 323, 327 (Pa. Super. 2016). The exception at issue here is actual or implied consent.

been, we find Commonwealth v. Wilson, 101 A.3d 1151 (Pa. Super. 2014) to be controlling on this issue (where it was determined that the statute governing the offense of driving under the influence of a controlled substance does not impose a two-hour time limit on testing for the presence of a controlled substance).

We also note that Defendant has challenged the propriety of the initial traffic stop in his motion. Based upon the testimony of Trooper Lazarchick, Defendant was observed travelling in both lanes and ultimately failing to activate his turn signal when changing lanes. Following the stop, the trooper observed Defendant to have glassy, bloodshot eyes and slow, slurred and confused speech. The standard field sobriety tests performed by Defendant indicated signs of impairment. Finally, Corporal Noonan performed a drug recognition evaluation at the Lehigh State Police barracks which confirmed Defendant's impairment. Therefore, we find no impropriety related to the traffic stop.

The Commonwealth bears the burden of proving that Defendant voluntarily consented to the warrantless blood draw by a preponderance of the evidence. Pa.R.Crim.P. 581(H); Commonwealth v. Wallace, 42 A.3d 1040, 1047-48 (2012). To prove voluntary consent, the Commonwealth must show that Defendant's consent was free of coercion, duress, stealth, deceit, or misrepresentation. Commonwealth v. Smith, 77 A.3d 562, 573 (2013). Whether Defendant's consent was voluntary is an objective, totality of the circumstances analysis. Id.

The facts of the case at bar are substantially similar to those of Commonwealth v. Banavage, 509-CR-2014 (C.P. Carbon 2017), a case decided earlier this year by the Honorable Roger N. Nanovic, President Judge of this Court. In Banavage, the defendant was stopped by police, field sobriety tests were administered, and the defendant was taken to a local hospital for a blood draw. The defendant was then read the PennDOT DL-26 form, she consented to the blood draw, and the analysis of her blood revealed the presence of a metabolite of a controlled substance. Since the DL-26 warning provided that the defendant would only be exposed to the enhanced criminal penalties set forth in section 3804(c) of the Vehicle Code if she refused the blood draw and was later convicted of violating 72 Pa.C.S.A. §3802(a)(1), President Judge Nanovic reasoned that the enhanced criminal penalties did not apply to the defendant because she could not be convicted under section

3802(a)(1) as the enhanced penalties apply only to motorists convicted of driving under the influence of alcohol, general impairment, and there was no indication she had been drinking. Motorists, such as 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, are automatically subject to the penalties described in section 3804(c). As a result, the enhanced criminal penalties provision included in the DL-26 form was found to be harmless error which likely did not impact the defendant's decision-making process.

In the instant case, the Commonwealth successfully met its burden to prove, by a preponderance of the evidence, that Defendant's consent was free of coercion, duress, stealth, deceit, or misrepresentation. Trooper Lazarchick testified that after he read Defendant the DL-26 form, Defendant asked no questions, indicated that he fully understood his rights, and presented no objection to submitting to a blood draw. Moreover, Defendant never stated that he consented to the test because he feared the consequences of enhanced criminal penalties if he refused. Upon meeting its burden of proof, the burden then shifts to Defendant to establish that his consent was involuntarily given. However, Defendant presented no testimony or evidence to refute the Commonwealth's position. Since the enhanced penalties provision of

the DL-26 form do not apply to Defendant, we find that the implied consent portion of the form did not compel Defendant to submit to a blood draw.

Defendant could have refuted the finding that his consent was given voluntarily by scrutinizing the remainder of the DL-26 form. To determine whether Defendant's consent was coerced based on the remainder of the DL-26 form, we must take an objective view of the totality of the circumstances. Specifically, we must consider:

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 its 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. Kemp, 961 A.2d 1247, 1261 (Pa. Super. 2008).

Based on the testimony presented at the suppression hearing and Trooper Lazarchick's affidavit of probable cause, we find no evidence of police excesses. Additionally, we note that the initial interaction took place roadside and that Defendant was then placed under arrest. From that point forward, Defendant's movements were directed by police, first to the State Police barracks where the drug recognition evaluation was performed and then to the hospital for a blood draw. Additionally, there was physical contact between

Trooper Lazarchick and Defendant, and Defendant was not readily free to leave. He did, however, have the right to refuse the blood draw. Moreover, there is no evidence of duress, or that his blood was drawn for medical purposes. Based on these circumstances, we find that a reasonable person in Defendant's place could give voluntary consent to a blood draw.

It is also important to note that consent must be knowing as well as voluntary. Smith, 77 A.3d at 578. To be knowing, the defendant must be aware that the evidence seized may be used against them in a subsequent criminal prosecution. Id. While no such warning was ever expressly relayed to Defendant, we are satisfied that Defendant knew, or should have known, that his blood would be used in a subsequent criminal proceeding since he was under arrest at the time of the blood draw.

Considering the evidence presented at the suppression hearing, we find that the Commonwealth has met its burden of proof. See Evans, 153 A.3d. 323. Consequently, the burden shifts to Defendant to establish that his consent was coerced. Defendant did not testify at the hearing leaving us with the uncontroverted testimony of Trooper Lazarchick. The trooper testified that after Defendant was read the DL-26 form, he was not confused, he had no questions, and he did not attempt

to refuse consent to the blood draw. Therefore, because the Commonwealth has met its burden in proving that consent was given knowingly and voluntarily, and because Defendant failed to successfully rebut this finding, we hold that Defendant freely gave consent to have his blood drawn and tested by the Commonwealth.

CONCLUSION

For the foregoing reasons, Defendant's "Motion to Suppress" will be denied and we will enter the following

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 RICHARD ALLEN BOYD, JR., :
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Richard Q. Hark, Esquire Counsel for the Defendant

ORDER OF COURT

AND NOW, to wit, this 28th day of June, 2017, upon
consideration of Defendant's "Motion to Suppress", and the
hearing held thereon, and following our review of the briefs of
counsel, and in accordance with our Memorandum Opinion bearing
even date herewith, it is hereby

ORDERED and DECREED that Defendant's "Motion to Suppress"
is DENIED.

BY THE COURT:


Steven R. Serfass, J.

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CLERK OF COURTS
OF CARBON COUNTY
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